Samuel Carter

A

TREATISE

CONCERNING

TRESPASSES

Vi & Armis.

WHEREIN

The Nature of Treſpaſs is clearly explicated, and the Giſt of the Action ſtated, and by whom ſuch Actions may be brought, and againſt whom and how to be laid. Together with the Forms and Learning of Writs, Declarations and Pleadings, in reference to all ſorts of Torts or Wrongs done to a Man's Perſon, Eſtate or Intereſt. And alſo wherein is contained all the Learning of our Law concerning Pleadings and Bars by way of Excuſe, Juſtification, Concord, Amends, *&c.* With the general Rules of Pleading in this Action, and particular Rules applied to every Caſe. Together alſo with a clear and methodical Diſcourſe of the curious Learning of Traverſes, of Replications in this Action; and of Evidence, Verdict, Damages, Coſts and Judgments therein. To which are added References to Preſidents and Entries proper to each Title.

A Work very Uſeful for Students and Practiſers of the Common Law.

By the Author of *Lex Cuſtomaria.*

LONDON,

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TO THE STUDENTS OF THE Common Law.

Gentlemen,

ACTIONS of Treſpaſs in our Ancient and Modern Books are very numerous (though ſince the Statute of *No more Coſts than Damage*, they have been frequently turned into Actions on the Caſe). And we need not wonder at it, conſidering the Infirmities of depraved Mankind. Without doubt the State of Nature now is a State of War; Injuſtice, Injuries, and Violences are radical in us ſince the lapſe of the firſt *Adam*; and theſe Seminal Principles are but too much improved by vitious Converſation and other Accidents of Life: Inſomuch, that were there not ſome Awe upon Mens Spirits, either by preſent

temporary Penalties, or perhaps a Proſpect of Futurity (the Notion whereof can ſcarce be wholly ſtifled) I believe the general part of Mankind would degenerate into Brutiſh Fury, and thoſe amongſt them whoſe Education might furniſh them with Sentiments truly humane, would be ſo few and inconſiderable, that their Inſtructions would be uſeleſs, and their Examples deſpicable. It is Fear which not only ſets Bounds to the Malice and Rapine of private Perſons, but of Societies; ay, and checks the Ambition of Kingdoms. It is not, as one ſaith, Seas or Ranges of Mountains that limit their Dominions, but a mutual fear of each other: Hence it is that they build Ships, and fortify their Frontiers, and retain the Idea of War in the midſt of the moſt profound Peace. So it is in a ſort amongſt private Perſons: I am not deſpoiled of my Goods, I am not injured in my Perſon and Intereſts, I am not diſſeized of my Eſtate; Thanks to our Laws, and not the good Nature of my Neighbour: I ſay our Laws, which will protect the wronged Innocent, and puniſh the tortious Actor. Were it not for this, every Aſſault and Battery would be no leſs than a *Mayhem*, or Murder, and that Fury which incites one to deſtroy his Neighbour's Suſtenance, would ſoon

provoke

provoke him to take away his Life. I have been the larger upon this Argument, for that it ſeems aſtoniſhing that there ſhould ſo many Thouſands Actions of Treſpaſs Yearly ſtand upon Record in a Chriſtian Polity, and where the eſſential Principles of the Religion which they Profeſs, lay an indiſpenſable Obligation to Peace, Love, Meekneſs and Charity: Hence it is then, that our Law-Books abound with ſo many Caſes of Treſpaſs, neither ought the Profeſſors thereof to be blamed for it. If a Man commit a Treſpaſs maliciouſly, I can pardon him and pity him as a Chriſtian; But I ought not to ſpare puniſhing him as I am a Member of a Politick Society, when he continues obſtinate and perſeveres in his Malice; but this Puniſhment muſt be by Law.

When I conſidered ſo many Caſes lay ſcattered and diſperſed in our Books, and ſeveral contradictory Reports of them, I believed it might be uſeful to bind them up and to methodize them, that ſo they might appear in full view; and by comparing one with another, the Truth and Force of the Reaſons might be better illuſtrated in themſelves.

The Method I have followed is easy and natural, not forc'd or elaborate. Divisions and Methods were invented for Perspicuity rather than Ornament; and that Order which is most conformable to the Subject Matter in Hand is best.

I have herein considered some Titles more particularly than others, either for their Importance, or their Abstruseness and Subtlety: For the former Reason I have been the larger on the Title of Declaration, as being the Fund of the Procedings; and an Error there is like a Failure in the first Concoction.

I have also been more particular as to Pleas by way of Justification, which are of great variety and exceeding useful. But as to the Learning of Traverses, the Art of Pleading is therein rendred fine and ingenious. It is one of the profoundest Pieces of Learning in our Law how to manage that part of Pleading, and therefore I well hope to beg the Reader's Pardon for being tedious on that Subject. In Traverses and Replications (in Trespass especially) the Beauty of accurate Pleading appears; they are like the just Proportion of Features, upon which results

ſults a good Mien, or (as we call it) an apt and proper Iſſue.

As to the Chapter of Damages, where we treat of ſevering them where they ſhould be entire, or giving them entirely where they ought to be ſevered, the Conſideration thereof may be uſeful to you in your Circuits, and as my Lord *Coke* obſerves in *Playter's* Caſe, Save their Clyent the Fruit of their Victory.

I foreſee it will be objected, That Ejectments as to Titles have juſtled out the old elaborate Pleadings in this Action. I ſhall only reply, It is ſo; but in ſome Caſes many would adviſe to try a Title rather by Treſpaſs or Replevin, *&c.* if they foreſee a material Point, which they would fix upon, than by Ejectment, where fifty Points may ariſe out of an hundred Skins of Parchment, and all ſtart up one immediately after another, to the confounding Judge and Jury, and to the Loſs oftentime of a Tryal, at leaſt for that Turn. However, no ingenuous Law-Student but will be delighted in this curious Learning, though the Practice of it (as to this) be laid aſide: It makes this Piece the more compleat, and I thought it not my Duty to offer you a maimed Preſent.

But I muſt not be too tedious, leſt I my ſelf become a Treſpaſſer againſt your Patience; which if I am, I ſhall not plead in Bar, but readily confeſs the Action by ſubſcribing my ſelf

Your Humble Servant.

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THE
Law of Treſpaſs,
Vi & Armis.

CAP. I.

Of the nature of Treſpaſs Vi & Armis, *and wherein it differs from* Trover, Replevin, Ejectment, *and* Treſpaſs on the Caſe.

FOR the clear underſtanding of the nature of this Subject (as it is ſettled at Common-Law) I ſhall firſt lay down ſome general Maxims, and then ſhew wherein it differs from other Actions, which are of ſome likeneſs to it in reſpect of *Tort*; and in the next Chapter I ſhall further explicate it, in ſhewing the *Giſt* of the Action, and what ſort of Poſſeſſion or Entry is requiſite to maintain this Action; wherein it will not be improper to add ſomething of Treſpaſſes by Relation, or what ſhall make a Man a Treſpaſſer *ab initio*: All which will fully unfold the Notion of Treſpaſs, and be a firm Foundation for the following Superſtructure.

As for exact Logical Definitions or Diviſions, *Dichotomies*, *Trichotomies*, and ſuch-like elaborate and ſubtle, as well as unprofitable fineſſes, I ſhall leave to thoſe who have time and leiſure for diverſions of that nature; our Common-Law-ſtudies obliging us to a true ſubtlety of Ratiocination and Pleadings, *veritatem & certitudinem inveniendi gratia non diſputandi*; between which and the other ſubtleties there is as much difference, as there is betwixt the nimbleneſs and skipping volubility of a wrangling Sophiſter, and the ſtated Gravity and prudent Arguments of a Serjeant at Law.

But Treſpaſs may be defined to be a *Tort-feaſance*, or doing wrong with Force and Arms, to the Damage of another in his Perſon, Eſtate or Intereſt: And this will comprehend all the ſorts or ſpecies of Treſpaſs, as you will find in your further peruſal hereof; and the reaſon of the addition of this form of words, *Vi & armis*, you will ſee hereafter.

But, to explicate the true Notion of it, *Note*,

1. *Treſpaſs diſaffirms Property.* Therefore the Plaintiff ſhall recover the value in Damages; except in Action of Treſpaſs or Raviſhment of a Ward, for in that he doth not renounce the Property. *Yelv. p.* 96. *Croke Jac.* 147. *Bagſhaw's* Caſe. Yet, though I have my Goods and Chattels again, I may bring my Action of Treſpaſs for the *Tort* as it is in *Hutton's Rep.* p. 81. *Laicon & Bernard.* An Action was brought, *quare cepit & abduxit* a Gelding; and by the Pleadings it appeared that he had his Gelding again. But ſome of the Judges, when this hath been cited in other Caſes, have not ſeemed well pleaſed.

2. The conſequence of the former Maxim is, *That the nature of Treſpaſs is to end in Damages*; and this differs it from *Trover* and *Replevin*, which affirm

affirm Property. *Hob.* p. 95. in *More* and *Huſſey's* Caſe.

3. *In Treſpaſſes* vi & armis, *there ought to be a voluntary act*, otherwiſe this Action lies not. If one drive Sheep by the way, and they eſcape into my Land againſt the will of the Driver, Treſpaſs lies not. So if a Dog chaſe the Sheep into another's Land. *Lach.* p. 13. 119. *Millen's* Caſe. And if one plead a tender of amends, he muſt ſay the Treſpaſs was involuntary; however, that is only in excuſe of the *Tort*.

4. *In Treſpaſſes* vi & armis, *there muſt be* damnum & injuria. A Treſpaſs ought to be done voluntarily, and ſo it is *injuria*; and it muſt be an hurt to another, and ſo it is *damnum*.

5. *There are no Acceſſaries in Treſpaſs.* In the loweſt and higheſt Offences, there are no Acceſſaries, but all are Principals; as in Riots, Routs, forcible Entries, and other Tranſgreſſions *vi & armis*. And ſo in the higheſt Offence, which is *Crimen læſæ Majeſtatis*, High-Treaſon, there are no Acceſſaries. *Co. Litt.* p. 57. *a.* He who gives conſent and aid to the Treſpaſs, is a Principal in the Treſpaſs. *Co.* 12 *Rep.* 82.

6. *Treſpaſs in Law is ſeveral, and one may anſwer without the other.* Co. Litt. 130. b. ſ. Vide *plus infra ſub tit.* Several Pleas.

7. *Actio perſonalis quæ oritur ex delicto moritur cum perſona*, as all Treſpaſſes of Batteries, *&c.* Plaintiff declares, That the Defendant did aſſault and beat, *&c. A.* his Wife ſuch a day, of which ſhe died ſuch a day enſuing: It's not good; this being a perſonal *Tort* to the Wife, it's dead with her. *Telv.* 89. *Higgins* and *Butcher.* The Executor ſhall have an Action *de bonis aſportatis in vita Teſtatoris*; but not for a perſonal wrong; as, a Keeper ſuffers the Eſcape of a Priſoner, and dies, his Executors may not be ſued for this.

Wherein Treſpaſs *differs from* Trover.

For a *tortious* taking of Cattle (as for an Heriot where none is due) Treſpaſs lies, or Trover at election; for a Man may affirm or diſaffirm his Property. *One may qualifie a Tort*; and for a *tortious* taking, a Man's Property is not diveſted but at his election. If Goods are taken by a Treſpaſſor, and if the party from whom they are taken be attainted of Felony, he ſhall forfeit them; for the Right and Property remains in him, and the Law ſhall adjudge them in him, until he makes his election to the contrary, by bringing a Writ of Treſpaſs. *Crok. Eliz.* 824. *Biſhop's* Caſe. *Crok. Car.* 89. *Kynaſton's* Caſe. *Mod. Rep. p.* 30.

In Treſpaſs, colour of Poſſeſſion given by the Defendant to the Plaintiff ſufficeth, becauſe this Declaration is general upon a ſuppoſal, without any Title put in certainty: But in *Trover*, and all other Actions where the Plaintiff makes Title to the thing demanded, there it behoves the Defendant to make a better Title to himſelf, and to traverſe the Title of the Plaintiff, or elſe to confeſs and avoid it.

There is a Caſe in *Stiles's Reports*, which is pretty ſubtle. Error was brought to reverſe a Judgment in Treſpaſs, *vi & armis*, at *Doncaſter*. The Error aſſigned was, That the Plaintiff declared that the Defendant took certain Cows of his out of the Juriſdiction of the Court, and brought them within the Juriſdiction, and there converted them to his own uſe; and it was adjudged to be Error, in regard the taking of the Cattle, which is the ground of the Action, was without the Juriſdiction of the Court: but had it been an Action of *Trover and Converſion*, it had been good; for in that the Converſion is the ground of the Action. *Stiles* p. 313. *Keightly* and *Rhodes*.

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Recovery in Treſpaſs for taking away Goods is no Bar to an Action of *Trover*. *Hutton* p. 81. *Lacon*'s Caſe; and ſo is *Putt* and *Rawſterne*'s Caſe. 3 *Mod.* 1. and *Raymond* 472. *Trover* and *Treſpaſs* are of different natures; as, upon a Demand and Denial, Trover will lie, but not Treſpaſs *vi & armis*, becauſe the taking was not *portious*.

Wherein Treſpaſs vi & armis *differs from* Treſpaſs on the Caſe. *Vid. poſtea*, cap. 3.

If one bring a meer Action on the Caſe, he may declare omitting the words *vi & armis*; but if the Action be a bare Action of Treſpaſs, there *vi & armis* muſt not be omitted, for it implies a breach of the Peace. *Pract. Reg.* 323.

Treſpaſs *vi & armis*, for chaſing his Cattle into the Cloſe of *J. S.* who took them *Damage-feaſant*, and the Plaintiff was forced to pay to him 40 *s.* for amends; but concludes not *contra pacem*. *Per Cur'* this is an Action on the Caſe, for the Action is not brought meerly for the taking and chaſing his Cattle, but for a ſpecial wrong, *viz.* for chaſing them into another Man's Soil, and he was forced to compound for damnification; and though it be *vi & armis*, yet that doth not prove it to be an Action of Treſpaſs, for that may be in an Action on the Caſe; as, in 9 *Rep.* Earl of *Salop*'s Caſe. *Crok. Car.* 325. *Tyffin* and *Wingfield*. Vide *infra plura de hoc*, cap. 3.

In Treſpaſs *vi & armis*, the Judgment is *quod capiatur*; in Treſpaſs on the Caſe, the Judgment is *in miſericordia*. *Vide plura*, cap. 3.

If the Action be an Action of Treſpaſs on the Caſe, though it were with a *vi & armis*, it may be good with a *quod cum*; but in a meer Action of

Treſpaſs *vi & armis*, it cannot be ſo. *Stiles Rep.* 429. *Michell* and *Hepworth*.

If Toll be taken by a Milner of one which ought to be Toll-free, a general Action of Treſpaſs lies, and not an Action on the Caſe. 2 *Roll. Abr.* 556. 10.

Wherein Treſpaſs *differs from* Replevin.

Treſpaſs is of leſs certainty than a Replevin: Therefore in a Declaration in Replevin a place ought to be aſſigned as well as a Vill, and the Place as well as the Vill are traverſable by the Avowant: But in Treſpaſs, the Plaintiff may aſſign his Treſpaſs only in a Vill; and if he aſſign a place, the Defendant may plead at another place, without traverſing the place aſſigned by the Plaintiff, and then the Plaintiff may take a new Aſſignment. *Hobart p.* 16. *Read's* Caſe.

In Replevin, becauſe the Plaintiff is to have a Retorn (that is to ſay the Avowant) it behoves the Avowant to make a good Title *in omnibus*; *aliter* in Treſpaſs. Defendant in Treſpaſs pleads that the Houſe was held of *N.* Earl of *N.* as of his Manor of *W.* Jury find it was held of *N.* Earl of *N.* as of his Manor of *S.* and good; *aliter* in Replevin. *Yelv. p.* 148. *Goodman* and *Ayling*.

As a Man may have Detinue or Replevin for Goods taken by a Treſpaſſor, which affirm always Property in him: ſo he may have a Trover; for one may qualifie a *Tort*, but not increaſe a *Tort*. *Crok. Eliz. p.* 824. *Biſhop's* Caſe.

Wherein Treſpaſs *differs from* Ejectment.

In Treſpaſs *Damages* are only to be recovered, but in Ejectment the *Thing* it ſelf.

Poſſeſſion

Poſſeſſion is a good Title for the Plaintiff in Treſpaſs, if the Defendant have no better to ſhew; alier in Ejectment; for there if the Plaintiff hath not Title according to the Declaration, he cannot recover, whether the Defendant hath Title or no. *Leon. p. 215.* in *Cotton's* Caſe. *Yelv. p. 223.*

The Title of the Plaintiff in Ejectment ought to be anſwered of neceſſity by matter of Fact or in Law, which confeſs and avoid the Title, or traverſe it; for a naked colour in this Action ſufficeth not, as in *Aſſize, Treſpaſs, &c.* which do not comprehend any Title or Conveyance in the Writ or Count, as this Action of *Ejectione firme* doth in both. *Dier 366. Pl. 35.*

The Plaintiff declares in Treſpaſs in one Acre, and abuts it; the Jury find him guilty in *dimidio acræ præd'*; this is good: But if it were in Ejectment, the Verdict had been ill; for it is not certain in what part the Plaintiff ſhall have his *habere facias poſſeſſionem. Yelv. p. 114. Winckworth's* Caſe.

In Ejectment the *Venire* muſt be *ad faciend' jurat' in placito Tranſgreſſionis & Ejectione firme*; in Treſpaſs it muſt be *in placito Tranſgreſſionis* only; for they are ſeveral Actions, and the *Venires* muſt be accordingly. *Crok. Eliz. p. 622. Clerk* and *Clerk*. Vide *plus* Law of Ejectment.

CAP. II.

The Giſt of the Action. What ſhall amount to a Treſpaſs, and what not. What ſhall be a ſufficient Poſſeſſion to maintain the Action. Where an Action of Treſpaſs lies not without Entry or Re-Entry, and where it lies for one without Re-Entry; And what Act ſhall make a Man a Treſpaſſer ab initio.

The Giſt of the Action, or what and when an Act ſhall amount to a Treſpaſs, and what not.

I Shall in the next place lay down ſome general Rules, how, and in what Caſes, a Man becomes a Treſpaſſer; for as to the laying the Action as to Time and Place, *vide poſtea.*

1. *Whatſoever is done* contra pacem, *is a Treſpaſs:* Therefore if a Man take my Servant out of my Service, and retains him, Treſpaſs lies againſt him; *aliter* if he procure him to go out of my Service, and then retain him. 2 *Rolls Abr.* 556. *Whetely* and *Stone.*

2. *For what is taken out of my poſſeſſion, Action of Treſpaſs lies*; as, If one reſcue a Man taken by a Serjeant at my Suit, Treſpaſs lies againſt him, or an Action on the Caſe, at my election. So againſt a Servant that takes Goods out of my Shop. 2 *Rol. Abr.* 556. *Whetely* and *Stone.* 1 *Leon. Rep.* 87, 88. *Aſhtell* and *Rudge. Pattinger* and *Marriot.*

3. *If Treſpaſs be laid before the Title of the Plaintiff accrue, it's not good*, though it appear upon Evidence only; as, The Plaintiff brings Action

Action for taking certain Carts loaded with Corn, which he claimed as a Portion of Tythes in the Right of his Wife, and ſuppoſeth the Treſpaſs to be done the 27th of *Auguſt*, 29 *Eliz.* and on *Not guilty*, it was given in Evidence for the Defendant, that the Plaintiff's Licence to be married was dated 28 *Auguſt* 29 *Eliz.* and that he was married the ſame day; the Bill abated. But if the Treſpaſs had been aſſigned to be committed one day after, then it had been good: but now it is apparent, that at the time of the Treſpaſs aſſigned by himſelf, the Plaintiff had no Title; and he was Non-ſuit. 1 *Leon.* 104. *Pawlett* and *Lawrence.*

4. *Poſſeſſion is ground ſufficient to maintain this Action*; and Poſſeſſion is a good Title for the Plaintiff, if the Defendant can ſhew no better. *Yel.* 223. 1 *Leon.* 215. *de hoc plus poſtea.*

5. *If a Man take another's Goods without any wrong done by himſelf, or come to them by Title, no Action of Treſpaſs lies.* If the Sheriff upon a Writ of Extent take a Furnace fix'd to the Land, and ſells this to *J. S.* and *J. S.* takes it, no Action of Treſpaſs lies againſt him; for *J. S.* comes to this without any wrong done by himſelf. So if a Stranger takes my Horſe or other Goods, and ſells them to *J. S.* and *J. S.* takes them accordingly, no Action of Treſpaſs lies againſt him. 2 *Rolls Abr.* 566. *Day* and *Auſten.* But if a Furnace be faſtned to the Wall of an Houſe, and is attach'd by the Sheriff, and delivered to the Plaintiff, who immediately took it, he was a Treſpaſſer. *Crok. Eliz.* 374. *Day* and *Bisbitch.*

6. *The Commander or Procurer of a Treſpaſs done, is a Treſpaſſer.* Latch. Rep. 154.

7. *Bailiff of Goods, as an Horſe*, &c. kills them, a general Action of Treſpaſs lies, or Trover. *Cok. Litt.* 57. a. for the Bailiff hath a bare uſe of them, and when he takes upon him as an Owner to kill them,

them, he loſeth the benefit of the uſe of them; or he may have an Action of Treſpaſs on the Caſe for this Converſion. 5 *Rep.* 13. b. The Plaintiff a Grocer held a Shop of Grocery, and declares *quod ille repoſuit fiduciam in Defendente*, to ſell the Grocery Wares of the Plaintiff in the ſaid Shop; and it was further found by ſpecial Verdict, That the Defendant being in the ſaid Shop, *cepit & aſportavit* the ſaid Wares, and did convert them; and it was adjudged in this Caſe, that an Action of Treſpaſs *vi & armis* did lie; for when the Defendant was in the Shop, the Wares did remain in the cuſtody and poſſeſſion of the Plaintiff, and the Defendant hath no intereſt, poſſeſſion or other thing in them, but only to utter them by Sale according to his Commiſſion. 1 *Leon.* p. 85. Caſe 110. *Gloſſe* and *Hayman.* Vide *Crok. Eliz.* p. 784.

He that will maintain this Action for any wrong done to him in his Lands or Goods, he muſt have a good Property, or at leaſt a good Poſſeſſion, in the thing wherein and whereof the Treſpaſs is ſuppoſed to be done.

8. *He that cometh to a thing by the Law, may not be charged in Treſpaſs*, as by the delivery of the Sheriff in a Replevin ſued, 44 *Ed.* 3. 6. Vide *ſupra.*

9. *For Non-feaſance no Action of Treſpaſs* vi & armis *lies.* 8 *Rep.* 146. 1 *Rolls Rep.* 130. Vide *plus poſtea*, tit. *Treſpaſſer ab initio.*

10. *When the Defendant's Beaſts are taken from him by wrong, and are not out of his poſſeſſion by his own delivery, he may juſtifie the taking them in any place he finds them.* Crok. Eliz. *p.* 329. Chapman's *Caſe.*

In Juſtification in Treſpaſs; the Caſe was in *Moor Mich.* 2 *Eliz.* a Man made a Leaſe for years of Land, a Stranger entred upon the Lands lett, and cut down Trees growing, and made them Timber,

Timber, and carried them into the *locus in quo*, *&c.* and then gave the Timber to the Plaintiff, and the Defendant entred into the Land, and took the Timber. *Per Cur.* In all Caſes where a thing is taken wrongfully, and altered in form, if yet that which remains is the principal part of the ſubſtance, the notice of it is not loſt, but the Property remains all; therefore if a Man takes Trees, and makes boards of them, the Owner may retake them, *quia major pars ſubſtantiæ remanet*; *aliter* if an houſe had been made of the Timber. So if a Man takes my Cloak, and of this makes a Doublet, I may retake it.

11. *In ſome Caſes this Action muſt of neceſſity be brought, and you cannot have another, or change it.* One who was not Bailiff to the Earl of *Bedford* took away Cattle, and in truth took away the Cattle as a Diſtreſs againſt the Earl's will, and in Replevin he made conuſance as his Bailiff. Now the Plaintiff cannot traverſe that he was not his Bailiff, for that is not iſſuable; nor can the Earl diſavow it, for he is not Party; nor can the Earl have an Action on the Caſe, for he is not damnified: but the party whoſe Cattle are taken may bring Treſpaſs; and then if the Defendant juſtifies as Bailiff, he may reply *de ſon tort demeſne ſans tiel cauſe*, and ſo puniſh him. *Crok. Eliz.* p. 14. Earl of *Bedford*'s Caſe.

12. No Treſpaſs lies for that which appears to the Court to be Felony. Our Books ſeem to vary. *Yelverton* fo. 89. *Higgins* and *Butcher*, ſaith it's an Offence to the Crown, and drowns the particular wrong. 2 *Rolls Abr.* 557. *Markham* and *Webb*'s Caſe, ſeems that it lies. I think they may be reconciled by this difference: After Conviction Treſpaſs lies, and not before; for if it would lie before, there is great danger the Felon would not be tried, and many Felonies would be ſmothered.

red. *Stiles* p. 346. *Dankes* and *Coveneigh.* Sed quære.

13. *He that cometh to Goods by delivery of the Plaintiff, may not be charged in Treſpaſs, but Detinue*; as, If *A.* buys Goods of me, and after leaves them in my Poſſeſſion, and I deliver them to another. 2 *Rolls Abr.* 555. But if the Goods be abuſed or deſtroyed, then Action of the Caſe lies for the Negligence. *Litt. Rep.* 15. 5 *Rep.* 13. b.

14. Treſpaſs may lie for Acts well done and well intended. *Dier* 36. b. Though a thing ſound to the Profit of a Man, and not for his Damage, yet it's not lawful to do a *Tort*; as, One ſees his Neighbour's Beaſts in another Man's Soil doing Damage feaſant; if he drive them out, the Owner ſhall have Treſpaſs. So 21 *H.* 7. a perſon brought Treſpaſs for Tythes taken away. Defendant ſaith, The Tythes were ſevered from the Nine Parts, and were in jeopardy of being eaten by Cattle, therefore the Defendant carried them to the Plaintiff's own Barn. Adjudged no Plea. *Dier* 36. b. 15 *H.* 7. 17. 17 *H.* 8. 15.

15. In ſome Caſes I ſhall have this Action, though I have parted with my Right to the thing; as, If a Man take my Goods, and after I grant them to another, yet I may have an Action of Treſpaſs for the taking, 2 *Rolls Abr.* 557. a.

16. If one load my Cart with his Corn, or Boat with Coals, or put his Saddle on my Horſe, I may well take my Cart with the Corn, or Boat with Coals, *&c.* and detain the Goods without being any Treſpaſſer, and keep them till he bring his Action of Detinue. 1 *Bulſt.* 96.

17. In perſonal Actions the Plaintiff may comprehend *Torts*, and ſeveral cauſes of Action; as, One Action of Treſpaſs for ſeveral Treſpaſſes made at ſeveral days, and in ſeveral places. 8 *Rep.* 87. b. *Buckmere*'s Caſe.

In

In Treſpaſs it appeared upon the Evidence, that the Defendant had the firſt Poſſeſſion, and then an Entry by the Plaintiff the very day of the Treſpaſs, is nothing without a Title: but if the Plaintiff had had the Poſſeſſion before the Defendant, though long before, it would be ſufficient; and then if the Defendant put him out of Poſſeſſion, Treſpaſs will lie of this putting out, without a Re-entry; at a Trial before Judge *Thorp*. Counteſs of *Arundel*'s Caſe.

What ſhall be a ſufficient Poſſeſſion or Property to maintain an Action of Treſpaſs, and what not.

A Man which hath a Freehold in Law, if he had not the actual Poſſeſſion, may not have an Action of Treſpaſs, as the Heir againſt the Abator. 19 *H.* 6. 28. b. 2 *Rolls Abr.* 553. S. 1, 2. 22 *H.* 6. 49.

If any had Poſſeſſion of a thing, he ſhall maintain the Action againſt him that had not Right. *Plowd. Com.* 546. a. 1 *Leon.* 215. Poſſeſſion is a good Title for the Plaintiff, if the Defendant have no better to ſhew. *Yelv.* 223.

Property draws with it the actual Poſſeſſion of the Beaſts or Cattle upon which to ground a Treſpaſs. If a Man gives to me his Goods in *York*; if another takes them, I ſhall have Treſpaſs. *Latch.* 214. *Hudſon*'s Caſe. 2 *Ed.* 4. 25. 3 *Rep.* 26, 27.

Where the Law caſts the Property or Poſſeſſion upon any, before Seizure, he ſhall have Treſpaſs; as, If any take the Goods of the Teſtator before the Executor hath ſeized them, he ſhall have Treſpaſs or Replevin before Probate, for the Property and Poſſeſſion was in him before Seizure. If the Ninth part of the Corn is ſevered for Tythes, the Parſon ſhall have an Action of Treſpaſs againſt him who takes

takes them before Seizure, for the Property and Poſſeſſion were in him before Seizure, for that the thing is certain by the ſeverance of the Ninth part. But if one ought to have the beſt Beaſt for a Mortuary, the Property is not in him before Seizure, for it may be queſtioned which is beſt, and for this he ſhall determine his election by Seizure, and before this he ſhall not have an Action of Treſpaſs or Replevin. *Plowd. Com.* 281. a. in *Greysbrook* and *Fox*'s Caſe. 2 *Bulſt.* 268. *Young*'s Caſe.

A Sheriff took Goods by *Fi. fa.* and before Execution done by Sale, the Defendant took them again, he may bring Treſpaſs, though he had not any Property. *Crok. Eliz.* 639. *Tirrel* and *Baſh.*

There are ſeveral ſteps to the Poſſeſſion to ſeveral purpoſes; for an Executor made at *London* ſhall have Treſpaſs of Goods at *York*: but the Lord ſhall not have Treſpaſs of a Stray before actual Seizure.

In Treſpaſs and Aſſault, Defendant ſaith, He was poſſeſſed of an Houſe, (and ſhews not how) *& molliter manus impoſuit ad extraponend' Quer' e domo, &c.* This is a good Juſtification, becauſe the Poſſeſſion is an inducement to the Plea, and he need not ſhew how or for what he is then poſſeſſed. 1 *Crok.* 138.

An Intruder ſhall not gain ſuch Poſſeſſion againſt the King, upon which he may have Action of Treſpaſs; as, The King is ſeized of Land in Fee, and a Stranger enters, claiming this as his own, and continues Years and Days, and another doth treſpaſs upon the Land, the Stranger ſhall not puniſh him. *Plowd. Com.* 546. a.

Where an Action of Treſpaſs lies not without Entry.

Lands deſcend to the Heir, without Entry he ſhall not have an Action of Treſpaſs. *Cok. Litt.* 57. b. as, If a Man lets the Land of his Wife for years, and the Wife die, the Heir ſhall not have Treſpaſs againſt the Leſſee before Entry.

A Man makes a Leaſe to *J. S.* to commence at the Feaſt of St. *Michael*; Leſſee may grant, but he cannot have an Action of Treſpaſs before Entry. *Plowd.* 142. in *Browning* and *Beeſton.*

Againſt a Tenant at Sufferance; as, If Leſſee holdeth over his term, the Leſſor cannot have an Action of Treſpaſs before Entry. *Cok. Litt.* 57. b.

My Father dies ſeized, and a Stranger abates, I ſhall not have an Action of Treſpaſs before Entry.

If a Man bargains and ſells Lands, he cannot bring this Action before actual Entry. *Carter's Rep.* 66, *Geary* and *Barcroft.*

If Leſſee at Will dieth, and his Heir enter, Leſſor ſhall have a good Action of Treſpaſs againſt him. *Litt. ſect.* 82. before Entry.

He that hath Right or Title to Land only, either by Deſcent, Condition broken, or a Leaſe made to him of the Land, may not bring this Action before his actual Entry into it. *Plowd.* 441, 546. *Keil.* 163.

Continual Claim, which is an Entry in Law, is as ſtrong as an Entry in Deed: therefore as often as he that hath Right of Entry maketh ſuch Claim, and, notwithſtanding this his Adverſary continues his Occupation, ſo often he doth wrong and diſſeiſin to him that made the Claim, and ſo often may he that makes ſuch Claim have Action of Treſpaſs, *quare Clauſum fregit*, and recover Damages. *Cok. Litt.* 256. b. 257. a.

Ceſtuy

Ceſtuy que uſe is at this day immediately and actually ſeized, and in poſſeſſion of the Land, ſo as he may have an Aſſize or Treſpaſs before Entry againſt any Stranger who enters without Title. *Crok. Eliz.* p. 46.

Where one may have Action of Treſpaſs without Re-Entry; and where not till after Re-Entry.

Diſſeiſee ſhall have an Action of Treſpaſs againſt the Diſſeiſor, and recover his Damage for the firſt Entry without any regreſs: but after regreſs he may have an Action of Treſpaſs with a *Continuando*, and recover as well for all the meſne Profits as for the firſt Entry, (*Co. Litt.* 257. a.) for he himſelf was ſeized at the time of the diſſeiſin, which is ſufficient poſſeſſion to maintain the Action, and therefore he ſhall have Treſpaſs for the Treſpaſs made in the diſſeiſin without Re-Entry.

But if a Man be diſſeized, he ſhall not have Treſpaſs for any Treſpaſs by the Diſſeiſor, or a Stranger, made after the Diſſeiſin, before Re-Entry. 2 *Rolls Abr.* 553. *S.* 3. But after Re-Entry he may, for by his Re-Entry his Poſſeſſion is reſtored *ab initio*, and for ever. Vide *Cok.* 11. 51. *Liford's* Caſe.

If my Diſſeiſor makes a Feofment in Fee, Gift in Tail, Leaſe for Life or Years, and after I enter upon the Feoffee, Leſſee or Donee, I ſhall have Treſpaſs againſt the Feoffee, Leſſee, *&c.* for the firſt Entry, although he comes in by Title. 2 *Rolls* 554. t. 7, 8. Vid. 11 *Rep.* 51. b. *Crok. Eliz.* p. 540: *Holcomb* and *Rawlins*.

By the Re-Entry of the Diſſeiſee, he is remitted to his firſt Poſſeſſion, and as if he never had been out of Poſſeſſion: and then all who occupied in the mean time, by what Title ſoever they come in, ſhall anſwer unto him for their time; as, If a Diſſeiſor

ſeiſor had been diſſeized by another, the firſt Diſſeiſee re-enters; he ſhall in Treſpaſs puniſh the laſt Diſſeiſor, otherwiſe after his Re-entry he ſhould have no remedy for the meſne Profits.

If an Eſtate be determined by Limitation or act of God after the diſſeiſin, ſo that the Diſſeiſee may not re-enter, he ſhall have Treſpaſs with a *Continuando* for all the time after the Diſſeiſin, and recover the meſne Profits without Re-Entry; as, If *Tenant pur auter vie* is diſſeiſed, and *Tenant pur auter vie* dies: So if the Tenant for term of years be ouſted, and after the term expires; *aliter*, if the Entry of the Diſſeiſee be taken away by his own act, as by Releaſe, *&c.* 1 *Rep.* 98. a. 2 *Rolls Abr.* 550.

Treſpaſs for meſne Profits.

In Treſpaſs for meſne Profits, Special Bail is always given. 1 *Keb.* 100.

If a Recovery be in *Ejectione firme*, and after Treſpaſs is brought for the meſne Profits before the Releaſe, nothing ſhall be given in Evidence but the Value of the Profits, not the Title. *Syderfin* p. 19. *Collingwood* and *Ramſey*.

A Termor being Outlawed for Felony, granted his Term and Intereſt to the Plaintiff, who is put out by *J. S.* and after the Outlawry is reverſed, and the Plaintiff brought Treſpaſs for the Profits taken between the Outlawry reverſed and the Aſſignment. Adjudged that the Action did lie; for though during that time the Queen had the Intereſt, and the Aſſignee had no Right, yet by the Reverſal it is as if no Oulawry had been, and there is no Record of it. *Crok. Eliz.* p. 270. *Ognell's* Caſe.

It was held by Juſtice *Vernon*, Where a Man would recover the meſne Profits in Treſpaſs, he muſt prove Entry into every parcel, and not into one part in the name of all.

An Action of Treſpaſs came to Trial before *Thorp*, for recovering the meſne Profits, and the Treſpaſs was laid 17 *May*, with a *Continuando*; and the firſt Entry was before the 17th day, and an Ejectment had been brought of this Land the ſame Aſſizes; and becauſe a ſecond Entry is required to recover the meſne Profits, the which if it ſhall be, will happen after that time which he hath acknowledged himſelf out of poſſeſſion by his Action of Ejectment, and ſuch Entry will abate the Action, it was directed to find Damages for the firſt Entry only.

It's a Rule in Law, Where a Man is remitted to an Eſtate, all perſons who occupy the Land, by what Title ſoever they come in, muſt anſwer to him for their time. *Crok. Eliz.* 54.

What Act ſhall make a Man a Treſpaſſer ab initio.

If a Man enter into a place by Authority of the Law, and abuſe this Authority, he is a Treſpaſſer *ab initio* by his firſt Entry. *Vide infra.* As, If one come into a Tavern, and ſtay there all night againſt the will of the Owner. *Vid.* 9 *Rep.* 22, 23. 8 *Rep.* 146. 5 *Rep.* 13. b. Six Carpenters Caſe.

If a Man deny Goods to the Owner which he had found, no Treſpaſs *vi & armis* lies; for no Non-feaſance ſhall make a Man a Treſpaſſer *ab initio*. *Cok.* 8 *Rep.* Six Carpenters Caſe.

If a Man take a Diſtreſs, and the other tender amends, and he refuſeth: yet no Treſpaſs lies againſt him for this Non-feaſance. 1 *Rolls Rep.* 130.

The Bailiff ſeizes Beaſts for an Heriot where was not any due, and without any command of the Lord, and after the Lord aſſented. *Per Cur.* Aſſent before or after the taking the Goods make

one

one a Treſpaſſer *ab initio.* But not an aſſent after to a Battery formerly done. *Crok. Eliz.* p. 824. *Biſhop's* Caſe.

If a Man ſeize or take a thing lawfully, and after abuſeth it, he is a Treſpaſſer *ab initio.*

If a Searcher unpack Cloaths, and throw them in the Dirt, he is a Treſpaſſer *ab initio.*

If a Man take my Sheep Damage-feaſant, and I tender ſufficient amends before the Impounding, he is a Treſpaſſer *ab initio* if he drive them to the Pound. 2 *Rolls Abr.* 561.

If the Lord of a Manor within the year labour the Eſtray, as by Riding, Drawing, *&c.* he ſhall be a Treſpaſſer *ab initio. Crok. Jac.* 148. *Bagſhaw* and *Goward.* So it is if one abuſe a Diſtreſs. 2 *Rolls* 562. 11. *Bagſhaw's* Caſe. *Yelv.* p. 96. *meſme Caſe,* though the taking the Eſtray be juſtifiable; for by the ſeizure of the Eſtray he had not a Property, but a nude Cuſtody.

If the Lord of a Fair take a Beaſt for Toll, and after work him, he ſhall be a Treſpaſſer *ab initio. Rolls* 2 *Abr.* 562.

If by Cuſtom Bailiffs ſeize Hides for non-payment of 2 *d.* for every Hide; if they tan them, and convert them to Leather, they are Treſpaſſers. *Duncon* and *Reeves* Caſe adjudged, *&c.*

If a Sheriff make no Retorn, or a falſe Retorn after the Party is arreſted, it is *faux Impriſonment* in the Sheriff, but not of the Sheriffs Bailiffs. *Q.* It is not ſo in any that comes in in aid of the Bailiffs: But Bailiffs errant or ſpecial are Treſpaſſers *ab initio* if they arreſt a Man, and the Sheriff doth not retorn the Writ. 2 *Rolls* 562, 563. *Parker* and *Moſſe.*

If the Lord comes upon the Land, and drive a Cow: If he do impound it, it ſhall be adjudged a Diſtreſs; but if he kill it, he is a Treſpaſſer. 9 *Rep.* 11. a.

A miſuſer of a Licence in Law makes a Man a Treſpaſſer *ab initio*; as, If a Man diſtrain Corn in the Sheaves, and thraſh it; or come into a Tavern, and ſteals, *&c. Yelv.* p. 96. in *Bagſhaw*'s Caſe. Otherwiſe of a Licence in Fact; for this excuſeth the Entry, and he ſhall only be puniſh'd for a tortious act, if any be.

If a Man makes his Executor, and dies, and the Executor, amongſt other Goods of the Teſtator, finds an Obligation in which his Teſtator was bound to *J. D.* and he breaks the Seals off, he is a Treſpaſſer *ab initio*. 2 *Rolls Abr.* 563. *Higginbotham*'s Caſe.

Of Commanders, Acceſſaries, Aſſiſters or Abettors in Treſpaſs.

If *A.* comes in aid of *B.* who beats me, although that *A.* do nothing againſt me, yet he is a Treſpaſſer as well as *B.* 22 *Aſſ.* 43. 27 *Aſſ.* 4. So if a Man command another to beat me.

Treſp' de Porco interfect' bar quod defendens fuit ſerviens Quer' & per Præcept' querentis interfecit Porcum. Rep. de injuria propria, & traverſe le Precept. Ra. Ent. 663.

If one conſent to a Treſpaſs done, he ſhall be charged as a Treſpaſſer. So where a Servant takes Sheep for an Amerciament, and the Maſter agrees, Treſpaſs lies againſt the Maſter and Servant. *Water*'s Caſe, 9 *Car.*

If

If a Servant do more than he is commanded by a Maſter, as, Where his Maſter bid him diſtrain my Cattle, and he abuſeth them, the Maſter ſhall not be charged with any more than he commanded him to do. 21 *H.* 7. 21 *Dier* 365.

If many come to do a Treſpaſs, and they are all preſent when the Treſpaſs is done, and ſome only look on, yet they all of them may be charged as Treſpaſſers, if they do not declare their diſagreement to it. *Hob.* 69.

If one command his Servant to do a Treſpaſs, which he doth, and then dieth before any Action is brought, yet the Maſter may be ſued for it. 17 *H.* 4. 19.

Cap. III.

Where Treſpaſs ſhall be Vi & armis, *and where not; and where it ſhall be Treſpaſs on the Caſe.* Et vide ſupra.

THough the Nature of the Action may be properly upon the Caſe, as touching the Plaintiffs Loſs or Damage, yet if done with Force, it may be *Vi & armis. Hobart* p. 180. *Wheatly* and *Stone. Stiles* p. 427. *Jones* and *Graves.*

Treſpaſs *quare Vi & armis apud* L. He erected a Toll-both, and took his Toll, *&c.* It is good *Vi & armis*, though he broke no Soil. *Crok. Jac.* 122. *Dent* and *Oliver.*

Againſt the Lord, *ſur Stat. Marl.* c. 15. *W.* 1. c. 16. ſhall be *contra pacem*, but not *Vi & armis.* So upon the Stat. for diſtraining *averia caruce, &c.* 2 *Inſt.* 131. *Dier* 312.

Treſpaſs againſt *S.* for that he *Vi & armis* reſcued one that was arreſted, and good. It will bear either Treſpaſs *Vi & armis*, or Treſpaſs on the Caſe. So for ſeizing an Heriot unjuſtly, *Trover* or *Treſpaſs* lies at election. *Stiles* p. 99, 100. *Crok. Jac.* 50. *Biſhop* and *Jordaine*'s Caſe. *Crok. Eliz.* 824.

Note, The *Vi & armis* is but matter of Form, which is aided by Stat. 27 *Eliz.* c. 5. of general Demurrers. 1 *Sanders* 81. *Lamb* and *King.*

In Treſpaſs *Vi & armis*, the Judgment is *quod capiatur.* In Treſpaſs in the Caſe the Judgment is *in miſericordia.* But the Plaintiff muſt beware that he follow his Original, if it be by Writ; for if that be *Vi & armis*, or upon the Caſe, the Judgment muſt be ſuitable, and ſo muſt it be in a Bill in the

Queens

Queens Bench; but if the Bill be Treſpaſs general, neither ſaying *Vi & armis*, nor *upon the Caſe* ſpecially, he may uſe it to either. *Hobart* p. 180. *Wheatly* and *Stone.*

Bailee of a Horſe, *&c.* kills him, Bailor ſhall have an Action of Treſpaſs generally, or Trover. So againſt a Servant for taking his Maſter's Goods. *Cok. Litt.* 57. a. *Leon.* p. 87, 88.

One cannot do a thing *vi & armis* and *contra pacem*, where the Land is his own. *Het.* 74. *Crok. Car.* 377.

For Non ſeaſance, or Negligence, it ſhall never be ſaid *vi & armis*, nor *contra pacem*; and when confidence is put in the party, Action on the Caſe lies; as, Bailment of Goods to keep them ſafe; and ſo of a Shepherd. 9 *Rep.* 50. b. Counteſs of *Salop*'s Caſe.

A Man may be liable to divers Actions for one Treſpaſs in divers reſpects; as, One gets my Daughter with Child, ſhe ſhall have an Action of Treſpaſs *vi & armis*, and I ſhall have Action of the Caſe *per quod ſervitium amiſi*; and I ſhall have time to bring my Action in ſix years, if I lay it in Caſe; and though the *cauſa cauſans*, as entring my Houſe, and making Aſſault on my Daughter, be *vi & armis*, it is but inducement to the Action, and the *cauſa cauſata* (viz.) the loſs of Service, is the ground of the Action. *Stiles* p. 398. *Norton* and *Faſon*. So that by this you may obſerve in many Caſes, though you have laps'd your time by the Statute of Limitations if you bring Treſpaſs *vi & armis*, yet you may relieve your ſelf by changing it into Treſpaſs on the Caſe.

When there are two cauſes of an Action on the Caſe, *cauſa cauſans*, and *cauſa cauſata*; *cauſa cauſans* may be alledged *vi & armis*, for this is not the point of the Action. The Defendant may *vi & armis* hinder the Plaintiff from the Exerciſe

of his Office, and this is *cauſa cauſans*; by which he loſt his Fees, this is *cauſa cauſata*, and the point of the Action. Breaking of an Inn may be alledged *vi & armis*, for the *defectus cuſtodie* is the point of the Action againſt the Inn-keeper; and therefore if it be not *contra pacem*, in ſuch Caſes it's good, though it be *vi & armis*; for though the Bill recites that it is *placitum tranſgreſſionis*, and the Declaration is *vi & armis*, yet this doth not prove it to be an Action of Treſpaſs, for that may be in an Action of the Caſe, as 9 *Rep.* Earl of *Salop*'s Caſe: and although the recital of the Bill be in *placito tranſgreſſionis*, yet it is not of neceſſity to be Treſpaſs only, but may ſerve for Treſpaſs on the Caſe. *Crok. Car.* p. 325. *Tyffin* and *Wingfield. Stiles* p. 398. *Norton* and *Jaſon.* 2 *Rolls Rep.* p. 139. *Dawtree* and *Dee*, *Allen*, *Rep.* p. 84. Sir *Anthony Aſhley Cooper* verſus *St. John.*

Treſpaſs by a Tenant againſt his Lord is not *vi & armis.*

Action *ſur Stat.* 5 *R.* 2. 7. of forcible Entry, is not *vi & armis.* 1 *Bulſtr.* 210. *Cox*'s Caſe.

Nuſance is a Treſpaſs, but not *vi & armis*; and ſo are all Treſpaſſes on the Caſe. *Fitzherbert* N. B. tit. *Tranſ.*

In Action of Battery the Plea-Roll was *vi & armis*, but in the Plea-Roll of the *Niſi prius* theſe words *vi & armis* were omitted. The Plea-Roll ſhall controul the *Niſi-prius*-Roll; and it's uſual to amend the *Niſi-prius*-Roll, and to give the very Judgment. 2 *Rolls Reports* 211. *Hunt* and *Atbill.*

Note a difference when an Intereſt is claimed, and when a Liberty only; as, Diſturbing a Man going to a Fair, it may well be *vi & armis*; for he had an Intereſt in the Fair to ſell his Commodities there. So of an Office or Mill; *aliter* in diſturbing him to ſit in an Iſle in the Church, this is

but

but a Liberty. Yet *quære* if Injury be done to his Perſon. 2 *Rolls Rep.* 139. *Dawtry* and *Dee.*

In Action on the Caſe, Plaintiff declares, That whereas he had a Meadow, *&c.* that the Defendant had *vi & armis* erected a Bank, *per quod* the Water overflew and drowned his Meadow. Now, becauſe the erection is ſaid to be *vi & armis*, and not the overflowing, and the overflowing is the point of the Action, it's good.

If a Man declare that he erected a Bank *vi & armis* in his own Soil, *aliter*; for it may not be *vi & armis* in his own Soil. 2 *Rolls Rep.* 248. *Whiting* and *Beenway.*

CAP.

CAP. IV.

Having fully explicated the Nature of Treſpaſs, I ſhall now mention the ſeveral ſorts of Treſpaſſes. but ſhall not ſay any thing upon them, becauſe they are ſpoken to in particular hereafter.

TReſpaſſes are either by Common-Law or Statute-Law.

By Statute-Law.

As to Treſpaſſes by the Statute-Law, they are ſuch as theſe: *De malefactoribus in parcis*, vid. *Dier* 238 & 327. *ſur Stat. W.* 2. *c.* 10. and Judgment in it.

De bonis aſportatis, per 4 *Ed.* 3. *c.* 7. the Adminiſtrator as well as the Executor ſhall have this Writ by Equity of the Statute. *Plowd.* 178. b. in forcibly Entry, upon the Statute 5 *R.* 2. *c.* 7. 8 *H.* 6.

Treſpaſs *ſur Stat. quod nullus diſtringat' per averia caruce*, &c. Vid. *Dier* f. 312.

Now I ſhall note ſome general Obſervations as to Treſpaſſes by the Statute-Law.

If a Bill or Writ contain an Action at Common-Law, and the Declaration compriſe matter upon the Statute, then the Plaintiff hath waved the remedy of the Statute, and ſhall have Judgment at Common-Law, as Treſpaſs or Raviſhment of Ward upon the Statute is given. So a Man ſhall have a general Writ of Treſpaſs for breaking his Park, where remedy is given by the Statute *de malefactoribus in parcis.* So one may have Treſpaſs

at

at Common-Law, or an Appeal of *Mayheim*, upon the Statute. 2 *Rolls Rep.* p. 49. *Cranbank's* Caſe.

Recovery in an Action of Treſpaſs at Common-Law, is a good Bar in an Action of Treſpaſs on the Statute, as it ſhall bar in a Writ of Raviſhment of Ward, ſo in Treſpaſs of Battery and Appeal of *Maybem*, and in common Treſpaſs upon the Statute 5 *R.* 2. or 8 *H.* 6. or *malefactoribus in parcis.* Hob. 94.

In Treſpaſs on the Stat. *R.* 2. Defendant ſaith, One *J. S.* was ſeized of, *&c.* in his demeſne, as of Fee, and ſo ſeized before the Treſpaſs, infeoffs one *B.* in Fee, and the Defendant as Servant, and by the Commandment of *B.* did the Treſpaſs, and gives colour by *J. S.* This was held a good Plea, for that the Defendant had ſhewed to the Court a lawful Title to the Land where the Entry is ſuppoſed: but it's no good Plea in this Action for the Defendant to ſay that the place where the Treſpaſs is ſuppoſed is his Franktenement, without conveying to himſelf a Title to the Land; and yet that is a good Plea in a general Action of Treſpaſs. *Nota diverſitatem. Keil. Ter. Mich.* 18 *H.* 7. Caſe 1. *Stat. Marl. c.* 4. *Weſt.* 1. 16. 1 *&* 2 *Ph. & Mar. c.* 12. *Dier* 168. *Pl.* 20. *&* 177. *Pl.* 32. Treſpaſs for Beaſts, *ad loca incognit. fugata de Com. in Com. Lib. Intr.* 464. *Breve ſerra ſpecial*, and the place of taking is material, for diſtance of place makes the Offence: But if Land in one County be held of Land in another County, the Diſtreſs appertains to the Manor. *Com.* 204. b.

Before I come to treat of Writs of Treſpaſs, I ſhall cite two or three ingenious and uſeful Caſes as to Treſpaſſes in point of Diſturbance or Nuſances, which will be of good and daily uſe to inform a Man in ſuch Caſes what he may do, and yet not be a Treſpaſſer.

Juſtiſi-

Juſtification by proſtration for a Nuſance.
1 Rolls Rep. 393.

If the Lord leave not ſufficient Common, the Tenant ſhall have remedy by Aſſize, Treſpaſs, or Proſtration. *Cok. Mag. Char.* 88.

If one make a Ditch, or raiſe a Bank, to hinder my way to my Common, I may juſtifie the throwing it down and filling it up. *Stiles Rep.* 470. *Williamſon's* Caſe.

I may enter into another Man's Land to throw down a Nuſance; as, Water runs by the Land of *M.* and *M.* ſtops the Water-courſe, ſo that it ſurrounds my Land, I may enter into his Cloſe, and abate this. 2 *Rolls Abr.* 565. 9 *Rep. Baten's* Caſe. Or ſtops the Water to a Mill. 9 *Ed.* 4. 35. Nuſance Executory may be abated. 3 *Bulſtr.* 197. *Morrice's* Caſe. 5 *Rep. Penruddock's* Caſe.

If a Man juſtifie the Proſtration of a Nuſance, and that he was poſſeſſed for years, he ought to ſhew that it continues. 3 *Bulſtr.* 198.

If one hath Land adjoyning to my Land, and levieth a Nuſance, I may enter upon the Land, and abate the Nuſance. 9 *Ed.* 4.

A Traveller may break a new Gate ſet up in the King's Highway where none was before. *Car. B. R. Haywood's* Caſe.

CAP.

CAP. V.

Of Writs of Treſpaſs, and their Forms; and how and where the Writ is abated.

A Writ of Treſpaſs lies for divers things which are not in the Regiſter; as, for a Parrot, oppinjay, Thruſh, *&c. Crok. Eliz.* 770. *Barham's* Caſe.

As for the form of words, *vi & armis*, enough ath been ſpoken in the third Chapter; and where Writs may be *contra pacem*, and yet without *vi & rmis*.

The form of the Writ for a live thing, as an *Abduxit.* lorſe, *&c.* is *ceperunt & abduxerunt*; and for a *Aſportavit.* ead thing inanimate, *ceperunt & aſportaverunt.*

If it be for dead Chattle, the Writ muſt ſay *ad* *Ad valentiam.* *alenciam*; and for live Chattles, *pretij. Nat. Br.* *Pretij.* 8. b. *Dier* 121. b. But for pulling down an louſe it need not be ſaid *ad valenciam. Stiles* 385. *awley's* Caſe.

Where the Writ is brought for one thing only, *Writ of one thing, or for ſeveral.* ere mention is made in the Writ of the nature of : but when the demand is made of divers things, is *de quibuſdam bonis & catallis. Crok. Jac.* 307. *yſon* and *Procter*. The Writ was *bona & catalla* the Defendant *cepit*, &c. and the Count was of a le of Woad, and the Writ abated. *Keiloway Trin.* 3 *H.* 7. Caſe 1.

The Clerks have invented *ac etiam Bille's*, for *Ac etiam Bille.* e avoiding of the Statute of 13 *Car.* 2. *c.* 2. which quireth the Cauſe of Action ſhould be ſpecified, elſe no Special Bail, unleſs the Sum be above 40 *l.* d when no Special Bail is to be put in, no *ac etiam* ought to be

For

Contra Pacem. For a Treſpaſs done in the time of Queen *Elizabeth*, and concludes *contra pacem dict' Dom' Reginæ & Regis nunc*: It was moved in Arreſt of Judgment, That a Treſpaſs committed in the time of Queen *Elizabeth* may not be *contra pacem* of King *James*. But Judgment *pro Quer'*; for *contra pacem Regis nunc*, is Surpluſage. With this agrees the Reſolution in *Siderfin*, p. 253. The Writ was *contra pacem Dom' Regis nunc*, when the Treſpaſs was committed in the former Reign. This is form, and a Writ of Error lies not for this: But,

If part of the Treſpaſs be committed in the time of the Queen, and part in the time of the King, it muſt be alledged to be *contra pacem* of both. 1 *Rolls Rep.* 259. *Cuddington* verſus *Wilkins*. *Crok. Jac.* 377.

In an Action of the Caſe *vi & armis*, it's not needful to conclude *contra pacem*: but it muſt be in an Action of Treſpaſs *vi & armis*. *Stiles Rep.* 405. Yet good enough after a Verdict, without *vi & armis*, or *contra pacem*, by Stat. 16 & 17 *Car.* 2. cap. 8.

Preſidents and Forms of *contra pacem.*

Contra pacem nuper Regis. Vet. Intr. 220.

Contra pacem H. *nuper de facto, non de jure Regis.* Ra. Entr. 578, 616.

Contra pacem modo Regis, & nuper Regis. Ra. Entr. 529. Co. Entr. 656. Plowd. Com. 41. b. *Wymbiſh* and *Talboys*.

A Man may have a Writ of Treſpaſs for divers Treſpaſſes; as, for breaking his Cloſe, cutting his Trees, fiſhing of his Waters, battery of his Servants, *&c.* and all in one Writ. *N. B.* 86. *L.* 87. *G. Dier.* 70. *Pl.* 35.

Obſerve, Treſpaſs is ſometimes brought by Original Writ, and ſometimes by Bill.

One

One is ſued in Treſpaſs by Original, and the Sheriff returns the Defendant *attachiat' eſt per catalla ad valenciam* 10 l. He ought to ſhew the *catalla in ſpecie*; for the *catalla* by which the Defendant is attached are forfeit to the Queen at the day of the Retorn, if he make default. *Vid.* the form of the Entry, *Dier fo.* 199. *Pl.* 54.

Original General, and Count Special; as 5 *Rep.* 34. *Playter's* Caſe.

Note, In all Writs *Vi & armis*, Proceſs of Outlawry lies by the Common-Law. *Plowd.* 228. b.

Note, Treſpaſs *vi & armis* lies not in the County-Court; without *vi & armis* it doth. *Mod. Rep.* 215. *Wing* and *Jackſon*.

Abatements of Writs of Treſpaſs.

If the Plaintiff lays his Treſpaſs before his Title alledged accrued to him, the Writ ſhall abate; as, in 1 *Leon.* p. 104. *Pawlet* and *Lawrence*. Vide ſupra.

Narratio variant from the Writ, and *Abatement per Miſnomer*. Ra. Entr. 616.

Miſnomer of one of the Defendants ſhall not abate the Writ. 8 *Rep.* 159. b.

Plaintiff declares againſt the Defendant *nuper de* C. *in Com'* S. Chandler. The Defendant pleads in Abatement of the Writ, That he the day of the Writ purchaſed was a Gentleman, *&c. Et hoc*, &c. *Per Curiam*, the Plea was ill, becauſe he did not traverſe that he was a Chandler. *Crok. Eliz.* p. *Devent* and *Popham*.

Treſpaſs againſt *T.* for taking his Cattle. The Defendant pleads the Plaintiff was poſſeſſed of the Cattle jointly with another not named in the Writ, and demands Judgment of the Writ. The Plaintiff replies, the other was dead at the time of the Action brought.

brought. *Per Cur.* a *Reſpondeas ouſter* awarded; for the Defendant's demurring to the Plaintiff's Replication was only for delay. *Stiles Rep.* p. 102. *Scoble* and *Toley.*

The Defendant (after the general Imparlance) pleaded, that he and two others not named did the Treſpaſs, and ſo prays Judgment *de Billa.* A *Reſpondeas ouſter* was awarded, and *per Cur'* the Defendant may after this plead the Releaſe of the Plaintiff in chief. 1 *Keb.* 715. *Wright* verſus *Bright.*

Two Joyntenants bring Treſpaſs, and one dies, all ſhall abate; *aliter* if brought againſt two Jointenants. *Crok. Jac.* 214. Sir *Oliver Leigh*'s Caſe.

In Treſpaſs againſt two, if the Plaintiff confeſſeth they did the Treſpaſs ſeverally, the Writ ſhall abate. 11 *Rep.* 5. b.

In Treſpaſs, after Pleint or Count made, the Writ purchaſed after ſuch Pleint or Count ſhall abate. *Nota,* It is parcel of the Plea to ſay the Plaintiff hath declared. 5 *Rep. Sparrey*'s Caſe.

If a Bill be fil'd in *Hillary*-Term, and declares that the Defendant had aſſaulted and beat his Servant, *per quod* he loſt his Service from ſuch a time to ſuch a day, and continues the Loſs and Treſpaſs till after the Action brought, the Bill ſhall abate. 1 *Rolls* 576.

If the words *vi & armis* be omitted, it ſhall abate, though after a Verdict *pro Quer'*. It is the eſſential part of the Declaration, which induceth to have a Fine for the King. Treſpaſs for taking away a Bag of Money, *vi & armis* being omitted, Judgment was reverſed, that being aſſigned for Error. *Crok. Jac.* 526. *Willis* and *Neilder. Hill.* 13 *Jac. Welſtead* and *Taylor.* But by the Stat. 16 & 17 *Car.* 2. *c.* 8. after a Verdict Judgment ſhall not be ſtayed or reverſed for the want of the words *vi & armis* or *contra pacem.*

If

If Treſpaſs be laid before the Title of the Plaintiff accrue, though it appear upon Evidence only, the Writ ſhall abate. *Vide ſupra, Pawlett* and *Lawrence*'s Caſe.

One Tenant in Common brings Treſpaſs for entring into the Land; it's a good Plea in Abatement to ſay that the Plaintiff was Tenant in Common with a Stranger. *Crok. Eliz.* 554. *Deering*'s Caſe. So in Joyntenants.

Treſpaſs againſt one; the Defendant pleads in Abatement, That he with others did the Treſpaſs. It was prayed, that he having confeſſed the Treſpaſs, Judgment final ſhould be given: But the Court granted a *Reſpondeas ouſter*. The Iſſue may as ſoon be tryed as a Writ of Enquiry of Damages. *Siderfin* 190. *Wright and Bright.*

In all Actions of Treſpaſs which are grounded upon a *Tort*, the Death of the one ſhall not abate the Writ of the other: But if it be founded on Contract, as *nil debet*, *n'unq; receivor*, there by the Death of one the Writ abated againſt the other. *Raym.* 131.

Cap. VI.

Of Declarations in Treſpaſs; and therein of laying the Action as to Time and Place. Of the former Pretij *and* ad valenciam, Vi & armis, *and of laying the Plaintiff's Property. Of variance between the Writ and the Declaration. Of Certainty as to Words, and* Anglice's. *Things, their Nature, Kind and Number. Of expreſs Averment. Of the forms of* alia Enormia, *and* adtunc & ibidem, *how extended and expounded, and of the Plaintiff's making a Title in his Declaration; And likewiſe of the* Simulcum, *and the* Continuandoes.

Of laying the Action as to { Place, Time.

TReſpaſs *quare Clauſum fregit* muſt be laid in the County where the land lieth, for they are local: but as to tranſitory Actions, as for beating a Man, *&c.* the wrong being done in one Town, the Plaintiff may alledge it to be done not only in another Town, but another County; and if the Plaintiff lay the thing to be done in another place, the Defendant may not traverſe, and ſay it was done in another place, and not in the place ſet down in the Declaration, unleſs there be ſpecial cauſe of Juſtification which doth extend to the place; as, in the Caſe of a Conſtable arreſting a Man, and of Officers for any thing done about their Offices, or when an Action is brought againſt a Man for doing any thing under any Act of Parliament. *Co. Lit.*

Litt. 282, 283. But generally tranſitory Actions are uſed to be laid in that County where the Cauſe of Action did firſt ariſe.

Where a County is in the Margin of a Declaration, and the Treſpaſs is alledged to be done *apud D.* and doth not ſhew in what County *D.* is, yet it is well enough, for it ſhall be intended to be in the ſame County which is in the Margin; *aliter* if it be in an inferiour Court, though the Vill be in the Margin, yet he muſt ſay *infra Juriſdictionem Curiæ.* *Crok. Jac.* 95. *Quarles* and *Searle.*

If one beat my Servant in one County, and I loſe my Service in another, I have my election where to lay my Action. So of retainer in one, and departure in another. 1 *Keb.* 145.

If Treſpaſs be done in divers Towns in one Shire, they may be all joined in one Writ, (*viz.*) who *vi & armis* the Cloſes of the Plaintiff at *H. B.* and *C.* have broken. 1 *Brownlow* Rep. 196.

Treſpaſs for cutting up two *Teſta*, *Anglice* Floodgates, in *Staff.* whereby the Water could not come to his Mill in *Cheſter*, the Action, according to *Bullwer*'s Caſe, is well brought. 1 *Keb.* 139, 145. *Slaney* and *Egerton.*

If one procure or command another to do a Treſpaſs in another County, the Action ſhall be brought againſt the Commander or Procurer where the wrong was done. *Dier f.* 39. *Pl.* 56.

If a Man take Goods in one County as a Treſpaſſer, and carries them into another County, Action ſhall be brought in the firſt County. *Dier f.* 40.

As to the Time *of laying the Action.*

As to the Statute of *Limitations*, vid. *infra ſub titulo* Pleadings.

Treſpaſs may be laid before or after it was done, ſo it be before the Action brought; as, if it were done the 4th of *May*, and the Plaintiff alledgeth the ſame to be done the 5th of *May*, or the 1ſt of *May*, and upon Evidence it falls out that the Treſpaſs was done before the Action brought, it's ſufficient. 19 *H.* 6. 47. 5 *Ed.* 4. 5. 21 *Ed.* 4. 66.

In Treſpaſs on the Statute of Monopolies, made *An.* 21 *Jac.* Plaintiff declares, That 13 *July* 14 *Car.* Proclamations were made of Wines, by colour of which the Defendant, 7 *Jan.* 20 *Car.* procur'd the Plaintiff to be impriſoned, and that afterwards the Defendants, *poſtea, ſcilicet* 14 *July* 20 *Car.* threatned the Plaintiff to impriſon him, ſo that he durſt not go about his Affairs. *Per Cur'.* The *poſtea* in the latter place muſt refer to the time immediately precedent, and cannot leap over that, and refer to the time of the Proclamations, and the time brought in by the *ſcilicet* was repugnant and void, and the Declaration ſtands as if no ſuch time had been alledged, and good after a Verdict. *Allen* p. 22. *Sims* and *Gregory*.

Bill is filed *Hill.* 18 *Jac.* and the Battery is ſuppoſed 20 *Jan.* 17 *Jac.* and the loſs of Service to be *per magnum tempus, ſcilicet a præd'* 20 *March* 17 *Jac. uſq;* *primum Martij* following, which was in *March* 18 *Jac.* and this is to the time after the Action brought, and Damages are given for the time after the Action brought. *Per Cur'.* This is naught, and is not aided by intendment, or amendable; for here the point of the Action is the loſs of the Service. *Crok. Jac.* 618. *Hanbury* againſt *Ireland*.

Treſpaſs for taking his Beaſts, 22 *Nov.* 39 *Eliz.* Defendant juſtifies for Damage-feaſant in his Freehold. Plaintiff replies, long time before the Treſpaſs the Parſon of *D.* was ſeized of ſuch Land in Fee,

Fee, and of Common for 100 Sheep appertaining, and 4 *Nov.* 39 *Eliz.* lett that Land and Common to the Plaintiff for years, and ſo he put in his Beaſts; it's an ill Replication, for the Plaintiff entitles himſelf by a Leaſe 4 *Nov.* 39 *Eliz.* which was long time after the Treſpaſs ſuppoſed in the Declaration (Q. *Eliz.* beginning her Reign 17 *Nov.*) But upon Iſſue and Verdict, it's aided *per Stat. Jeoffayl*, it being a miſ-pleading. *Crok. Eliz.* 722. *Buſhwood* and *Pond.*

Plaintiff declares, Whereas he was poſſeſs'd of a parcel of Land adjoining to a certain River, from the 20th of *May* 29 *Eliz.* until the day of the bringing this Writ, the Defendant had the ſaid 20th day of *May* ſtopt the ſaid River with Loads of Earth, and ſo it continued till the 14th day of *February*, *per quod* his Land was drowned. In arreſt of Judgment it was moved, that the Plaintiff hath made Title to the Land from the 20th day of *May*, ſo as that day is excluded, and the Nuſance is ſaid to be made the 20th day, and ſo the Nuſance was before the Plaintiff's Poſſeſſion. *Per Cur'.* Though the ſtopping was made before the Poſſeſſion, yet the continuance of the ſame is after, and a new wrong, and the Action lies. 2 *Leon.* p. 103. *Waſhburn* and *Mordant.*

Treſpaſs was laid with a *continuando uſq; diem impetrationis brevis* (viz.) 14 *diem Febr. anno* 17: whereas the Writ bore *Teſte* 12 *Octob. anno* 17. which was before the day alledged for the time of the continuance; yet the Plaintiff after a Verdict had his Judgment. 20 *H.* 6. 15.

In Treſpaſs *per quod ſervitium amiſit per longum tempus videlicet per ſpacium ſex mens' tunc prox' ſequen'*, and the Original bore *Teſte* within the ſix ſix months; and after a Verdict, the Plaintiff had Judgment, for the [*videlicet*] was more than needs, and it ſhall be taken to be out of the conſideration

of the Jury in taxing the Damages. *Hob.* 284. *Hunt* and *Lawring*.

In Battery of his Servant, the Plaintiff ſhall recover within ſix years before the Action. Sir *John Lake*'s Caſe, cited 1 *Keb.* 11. in *Bradford*'s Caſe.

The Court will take notice of the day in a Treſpaſs, to ſupport a Judgment, but not to deſtroy it. 2 *Keb.* 287. *Howard* and *Gregg*.

If Treſpaſs be ſuppoſed to be done after the Action brought, it's not cured by *Non cul'*, unleſs the Judge will permit the Jury to find the matter ſpecially, that the Defendant is guilty of the Treſpaſs ſuch a day, which is before the Action brought. *Siderfin* 308.

Where it ſhall be ſaid pretii, *or* ad valenciam, *and where not.*

If the Declaration doth not ſay *pretii* for live Cattle, and *ad valenciam* for dead Cattle, Judgment was revers'd. *Stiles Rep.* 182. *Dell* and *Browne*. Yet now it's adjudged, that if *pretii* or *ad valenciam* be omitted, that after Judgment it is aided by the Statute of *Jeofayls*. *Siderfin* p. 39. *Uſher* and *Buſhel*. So in Judgment by default. 1 *Keb.* 552. *Taylor* and *Hardye*.

Of Beaſts *capt' fugat' & imparcat'* he ſhall ſay *pretii*, for that *cepit* implies he had gained a Property.

Argentum cepit & aſportavit, he ſhall not ſay *pretii*, for the Money comprehends the Value: If Pieces of Plate, *aliter*; *Auri tot florenos*, there it ſhall be ſaid *pretii*. *Reg.* 182. b.

In Treſpaſs *quod* 10 *equos ceperunt abduxerunt & fugaverunt*, by which he loſt 100 Loads of Hay, not ſaying *ad valenciam* or *pretii*, and not ſaying of what value the Horſes or Hay were, but

but concludes generally *ad valenciam* 100 l. *Per Cur'*. It's ill; after a Verdict it might have been good. 1 *Keb.* 248, 257. *Fenn* and *Driver*.

The Declaration is, *pedibus ambulando*, without ſaying *ad valenciam*: Yet if it be ſo in the Writ, it's good. *Siderfin Trin.* 15 *Car.* 2. *Hardy* and *Taylor*.

Treſpaſs *quare* 1 *May* 29 *Car.* 2. *clauſum fregit & intravit & fodit terram & aſportavit* 20 *carectat' terr' & ſoli valor* 40 s. *continuando tranſgreſſion' præd' quoad foſſion' caption' & aſportation' terre & ſoli præd' à præd'* 1 *die Maii uſq;* 1 *diem Junii tunc prox' ſequen' ad damnum* 30 l. Judgment *pro Quer' ſur Demurr'* and Writ of Enquiry, entire Damages, and adjudged ill, becauſe there is not any value of the Soil taken away during the *Continuando*. 2 *Levin.* 230. *Stride* and *Hunt*.

Vi & armis. Vide ſupra.

Vi & armis is neceſſary in the Declaration of Aſſault, and entring into his Houſe, and taking his Goods, and is not aided by the Statute of *Jeofayles*. *Crok. Jac.* 443. *Taylor* and *Welſted*. but it's aided by the Statute 16 & 17 *Car.* 2. cap. 8.

Defendant pleads to the *vi & armis Non cul'*, and ſaith not *Et de hoc*, &c. it's form, and the Plaintiff ſhall not take advantage of it in demureer without ſhewing it. *Siderfin* pag. 216. *Thacker's* Caſe.

In *Com' Banc'* the firſt Declaration did not contain *vi & armis*, the ſecond Declaration after the Imparlance did. It was Error. For the firſt Declaration is moſt material, and ſo the firſt Declaration *quod cum* he aſſaulted, was Error, though the ſecond Declaration was good. 2 *Rolls Rep.* p. 107. *Foord* and *Foord*. *Crok. Jac.* 536. *meſme Caſe*.

How and by what words Property muſt be laid in the Plaintiff in his Declaration.

In Treſpaſs for Goods, the Declaration ought ſo lay the Property of the Goods in the Plaintiff at the time of the taking; as, *cepit*, &c. *tres Taſſas*, Anglice Sheaves, (*ipſius querentis*) 3 *Bulſt.* 303. *Whiteman*'s Caſe; and ſo the Timber (*ipſius quer'*) *Stiles Rep.* 53. *Wood* and *Salter*. If one declare that the Defendant *Equum cepit à perſona querentis*, and ſaith not *Equum ſuum*, it's not good. 2 *Crok.* 46. *Yel.* 36. 1 *Brownl. Rep.* 192. *Purcell* and *Bradley*.

Treſpaſs for taking away Goods, and doth not ſay *ſua*. *Per Cur'*. This is ill. But *in cuſtodia ſua exiſten'* were ſufficient. 3 *Keb.* p. 100. *Gallant*'s Caſe. Treſpaſs for entring the Plaintiff's Cloſe, and ſo many Cartload of Corn, Hay, *&c.* not ſaying (*ipſius Querentis*) *cepit & aſportavit*, it's ill. So in *Simms*'s Caſe, Treſpaſs of breaking the Plaintiff's Houſe, and taking away divers Goods, and not ſaid *ſua*, and Judgment was ſtay'd: But in that Caſe, had it been *ibid. creſcen'*, it would be intended *ſua*; but being *carectat'*, it's ſevered, and may be a Stranger's Goods. Judgment was arreſted. 3 *Keb.* 524. *Holland* and *Ellis*.

Treſpaſs *vi & armis* for taking the Mare *ipſius Querentis necnon bona & catalla ſequent'* (viz.) and ſums them up, but doth not ſay they were the Goods *ipſius Quer'*. Defendant demurs thereupon; and reſolved the Plaintiff may have Judgment for the Mare, and releaſe the Action for the reſidue. *Raymund* 395. *Cutforthay* and *Taylor*.

Treſpaſs of digging his Soil, and carrying away 20 Loads of Soil, and ſaid not *ipſius Querentis*, it's ill. *Brewer*'s Caſe, cited 3 *Kel.* 519, or 529. in *Terry*'s Caſe 589.

In

In Treſpaſs by Infant *per* Guardian for cutting Trees (and ſaith not whoſe, nor in whoſe Poſſeſſion) and for carrying away the Wood of the ſaid Plaintiff. *Per Cur.* this is well enough; eſpecially Not Guilty being pleaded to the cutting. 2 *Keb.* 24. *James* and *James.*

Treſpaſs for taking a Hook, and ſaith not *Hamum ſuum*, and ſo hath not ſhewed in his Declaration that the Hook was in his Poſſeſſion, it's ill. But the Defendant pleaded a Way over the Plaintiff's Land, and the Plaintiff endeavoured to cut his Harneſs, and he took the Hook *extra Poſſeſſion'* of the Plaintiff; now the Defendant's Plea hath made the Declaration good. *Siderfin* 184. *Brook's* Caſe.

In *B. C.* the Writ was, *Bona & Catalla ſua cepit*, and the Declaration was *unum Bovem* without ſaying *ſuum*, and held good in the Common Bench, for there the Writ is parcel of the Declaration. *Siderfin p.* 184. *Brook's* Caſe, and *fo.* 187. *Jones* and *Pritchard.*

Of Variance between the Writ and Declaration.

The Writ was, *Quare Clauſum fregit*, and the Plaintiff declares of divers Cloſes. *per Rolls* it's well enough; for the Word *Clauſum* is *Nomen aggregativum*, and may contain many Cloſes. *Stiles* Rep. *Burrel* and *Lancaſter.*

In the Writ it was, *Bona & Catalla cepit*, and the Declaration was, (*videlt.*) *unum Diſcum Plumbi*; after Verdict it's aided *per Stat.* of *Feoffayles*, for for that part there is no Original. *Lit.* Rep. 311. *Furner* and *Disbery. Vide* a Cauſe ſomewhat like this in *Winch* Rep. 35. *Gell* and *White.* The Declaration was, *Quare Vi & Armis Bona & Catalla ſua ceperunt* (*viz.*) *tertiam partem unius Diſhei* part of a Diſh

Diſh of Lead Oar. This was thought a Variance between the Writ and the Declaration, and the Declaration is contrary to it ſelf: For if in a Replevin the Writ is *de Bonis & Catallis*, and his Declaration is of taking an Horſe, this is not good: Yet it's aided after a Verdict *per Stat. Jac.* 1.

The Bill is againſt ſix, and the Declaration againſt ſeven; this is Surpluſage as to the Seventh, becauſe there is no ſuch Perſon, and good for the others. *Siderfin* 253.

The Writ ſuppoſed the Treſpaſs to be done *apud H.* and the Declaration ſuppoſed the Treſpaſs to be *apud B. in H.* and after Verdict the Judgment was ſtayed for this Variance. The Difference is, where there is no Original it's aided by the Stat. 18 *Eliz. Aliter* where there is an Original and this varies from the Declaration. *Cro. Eliz.* 121. *Everard* and *Green. Cro. Jac.* 664. *Hendy* and *Thorſt.*

In *C. B.* the Plaintiff declares of a Battery done 1 *May*, to his Damage of 40 *l.* The Defendant imparles till the Term following, at which time the Plaintiff declares of a Battery done 2 *May* in the ſame Year, (and upon this Roll it is not entred *prout alias patet*) and Damage 100 *l.* and on not Guilty, Judgment *pro quer.* The Court inclined that it was well given in *C. B.* the firſt Declaration, *i. e.* before the Imparlance, is the chief Record. 3 *Bulſt.* 227. *Millward* and *Maby.*

In Treſpaſs, the Writ was, *Quare Clauſum fregit*, and the Count was, *Quare Clauſa fregit*; and for this Variance Judgment was reverſed.

The Treſpaſs in the Declaration was ſuppoſed to be in *London*, and the Writ was directed to the Sheriff of *Middleſex.* This Variance was held to be Error, *Cro. Jac. p.* 479. *Pollard* and *Blight*, for it's a vicious Original. But had it Been by Bill it had been aided by the Statute; for this Bill had been

been as no Bill at all. *Cro. Jac. p.* 654. *Calthrop* and *Culpeper*. *Vide* a Caſe as *Everard* and *Green*. in *Cro. Jac.* 664. *Hendy* and *Thirſt*.

Of certainty as to Words or Things, the Nature, Kinds and Number of them in Declarations.

Treſpaſs *quare Clauſum fregit, & ſpinas ſuas ad valentiam, &c. ſuccidit*, after Verdict it was moved in arreſt, That the Declaration was not good, becauſe he doth not ſhew the quantity of the Loads, and ſo uncertain, as in *Playter's* Caſe. But it was adjudged good becauſe of the many Preſidents ſhewn in maintenance thereof. *Cro. Jac.* 345. *John's* and *Wilſon*. But this is no great Satisfaction to an inquiſitive Mind.

Plaintiff declares for taking away ſix Mares and Colts, and ſhewed not how many Mares and Colts particularly, and Verdict *pro Quer.* but *nil cap. per Billam*. *Stiles* 416. *Hudſon* and *Dickinſon*.

Declaration for taking Cattle, or Cheeſes, or *Pullos Equinos*, not ſhewing the Kind or Number, is uncertain. 3 *Keb.* 507.

Tranſ. *quare Diverſas Teſtas* (*Anglice* Earthen Pots) *ipſius Quer. cepit*, it's not good for the Uncertainty; as a Treſpaſs for an Heap of Stones, for a Cart-load of Stones had been good. *Palmer's* Rep. 447.

Treſpaſs for entring his Houſe and taking divers Goods, *& inter. alia, unam parcellam penſaris Lanaris* (*Anglice* a Quantity of Woollen-Cloth) after Verdict *pro Quer.* and entire Damages, Judgment was ſtayed for the uncertainty of the Quantity, what it is. 2 *Levinz* 195. *Wade* and *Halther*.

As

As to Kind or Species.

De aſportatione of Beams, Scales and Weights, and doth not ſhew what Weights; and ill. *Stiles p.* 354. *Webb* and *Waſhborne.*

An Action for taking away two Trunks with Cloaths, and ſaid not what Cloaths; and yet held good. *Stiles* Rep. 354. Yet there adjudged Treſpaſs *de aſportatione* of five Locks and Keys, it's ill. *Stiles* ibid.

Plaintiff declares of breaking his Cloſe and eating his Graſs *cum quibuſdam Averijs*, and ſaith not what Cattel; *per Rolls* it's good enough, eſpecially after Verdict: For this Action is brought for Damages. *Stiles* Rep. 170. *Brook* and *Brook.*

Plaintiff declares for taking away forty Loads in Straw; and it appears not whether they be Horſe-Loads or Cart-Loads: *per Glin.* it ſhall be intended Cart-Loads. *Stiles* Rep. 466. *London* and *Wilcox.*

Treſpaſs *quare Herbam & Blada cepit*; 'twas moved in arreſt of Judgment, That no particular Grain or Species was expreſſed. So in a new Action for the ſame thing, this would be no Plea in Bar by Averment, which the Court agreed; yet the Species muſt be given in Evidence. 3 *Keb. p.* 42. *Maſcue* and *Shepard.*

Treſpaſs *quare Clauſum fregit, & Arbores ſuccidit, ad valentiam* 10 *l.* The Defendant demurred generally. The Plaintiff prayed his Judgment for breaking his Cloſe: But as to the other, the Declaration was inſufficient; becauſe not expreſſed what Trees. 1 *Ventr.* 53. *Tomlinſon* and *Hunter.*

Treſpaſs *Quare Clauſum fregit, & diverſas petias Marhemij cepit, &c.* Judgment by Default; upon the Writ of Enquiry returned, the Judgment

Judgment was ſtayed for the uncertainty of the Declaration. 2 *Ventr.* 262.

Treſpaſs *Quare percuſſit Accipitrem*, and doth not ſay what kind of Hawk, yet it's good. *Cro. Car.* 18. Sir *Francis Vincent's* Caſe; it is but one, and not like *Playter's* Caſe, 5 *Rep.*

Treſpaſs for entring his Houſe and breaking *duas Ciſtas*, and for taking *diverſa genera apparatuum in Ciſta præd. exiſten.* though the Words *diverſa genera apparatuum* are too uncertain in themſelves, yet being referred to a Cheſt wherein they lay, they are reduced to ſufficient certainty; but becauſe it was in *Ciſta præd.* in the Singular Number, it's altogether uncertain. *Allen's Rep. Hill.* 22 *Car.* 1. *B. R. Vincent* and *Furſey.*

Treſpaſs for carrying away ten Pieces of Timber, is certain enough. 1 *Keb. p.* 34. *Walcott* and *Tapping.*

Treſpaſs for taking and carrying away eight Firkins or Pots of Butter; after Verdict it ſhall be intended *Synonima.* 1 *Keb.* 43.

As to Words and Anglices.

Declaration for taking away *quinque Inſtrumenta Ferrea, Anglice* Fetters, it's naught; there being a proper Latin Word for Fetters, *viz. Compedes*, and the Office of an *Anglice* is to help Words of Art. *Stiles Rep. p.* 37. Yet in 3 *Keb.* 635. in *Tompkin's* Caſe, Treſpaſs was brought *de* 100 Yards *Panni Pendent. Anglice* Hangings, and adjudged good, though *Periſtroma* ſignifies Hangings.

Declaration *pro uno Pullo*, intending a Colt, not good, though there had been an *Anglice* with it. So *quoddam Inſtrumentum, Anglice* a Gridiron, is not good, becauſe the Latin imports no ſuch thing; if it had been *quoddam Inſtrumentum Ferreum*

Ferreum it had been good. *Siderſin. p.* 60. *Ellis* and *Yarrow*. *Inſtrumentum Ferri, Anglice* an Horſe-Lock, is ill. *Stiles Rep. p.* 327.

Treſpaſs for taking Goods, the Plaintiff counts *de una Satagine, Anglice* a Frying-Pan. Verdict *pro Quer.* It was moved in arreſt of Judgment, becauſe it ough to be *Sartagine:* But it was adjudged *pro Quer.* for if *Satagine* ſignifies nothing, then no Damages was given for it; and the Difference was taken where the Word ſignifies another thing, there it is ill; but where it is inſignificant there it doth not vitiate. *Raym.* 15. *Smith* and *Warner.*

When a Man expreſſeth in Engliſh a thing tortiouſly taken, and Engliſheth this, if the Latin word had not ſuch Signification with the Engliſh it's not good; but if he declares upon a Latin word which had not any perfect Significcation, yet upon the Engliſhing of this, by which the meaning of the Plaintiff doth appear to the Court, the Plaintiff ſhall recover, and the Jury ſhall be intended to give Damages according to the Declaration in Latin, not having reſpect to the Engliſhing: But when there is a proper Latin Word to expreſs the thing taken, if the Plaintiff declare by another Word it's not good *per Fenner, Yelverton* and *Williams* (but *Popham* thought this too nice and to tend to the Subverſion of divers former Judgments) therefore a Treſpaſs de *una Hama* (*Anglice* a Crow of Iron, was adjudged not good; *de Cruca cum apparatu* is good.

Treſpaſs *pro decem Caponibus* (*Anglice* Capons) *& Avibus Domeſticis* (*Anglice* Poultry) in *Taylor's* Caſe, 9 *Car.* 1. adjudged not good. *Stiles Rep.* 37. *Barker* and *Martin. Cepit & aſportavit decem Coria* (*Anglice* Hides) is good, *Stiles Rep.* 64. *Pool* and *Coply. Unum Lenat* (*Anglice* a Mat) and there is no ſuch Word as *Lenat.* *Cro*

Cur. it's all one as if it had been left out, and ſo no Damages given for it. For taking away *unum Aduſtum Ferreum*, which ſignifies nothing, *per Cur.* then no Damages are given for them. *Tria Suſpendia* (*Anglice* Pot-hooks) is good. *Stiles Rep. p.* 95.

Treſpaſs *pro quinque peciis Stanni* (*Anglice* Pewter-Diſhes) *per Rolls* the *Anglice* is void, and then the Latin is good, and it matters not what pieces they be, for it is *ad valentiam*, which makes it certain enough to the Jury. *Stiles Rep.* 102. *Levinz* and *Gamble*. Treſpaſs *de uno Ephipio*, it's good enough. *De Equo & Ephipio ad valentiam*, it's good enough, and goes to the whole. 2 *Keb.* 483. *Hill* and *Craſhaw*. Treſpaſs of 4 *Bovil. vocat.* Steers or Bullocks, the Engliſh was void, and Judgment *pro Quer.* 3 *Keb.* 646, 650. *Wood* and *Withers*.

Declaration that the Plaintiff took away *decem Velamina* (*Anglice* Coifs) *Pilum* a Cap, *decem Colores* (*Anglice* Neck-bands) *de uno Inſtrumento* (*Anglice* a Plate for a Jack) *pro uno operimento* (*Anglice* a Rale). *Per Rolls*, we muſt not be too curious, and therefore a Deſcription with an *Anglice* may ſerve. *Stiles Rep.* 125, 313. *Lloyd*'s Caſe. But for *Quoddam Inſtrumentum Ferrei* (*Anglice* a Gridiron) Judgment was reverſt. 327 *Stiles*.

But I ſhall cite no more of this Stuff; if the Student cannot find a proper Word, let him coyn one, or make an apt Deſcription.

Of expreſs Averment.

In Treſpaſs *Vi & Armis* there muſt be an expreſs Averment of the Force, and not whereas there was ſuch a Force. *Stiles p.* 353. and ſo in *Diſon* and *Barne*'s Caſe, *Stiles p.* 133. the Declaration

ration was, *quod cum, &c.* which was no direct Affirmative, and Judgment was arreſted. So in Treſpaſs for an Aſſault, the Plaintiff declares, *quod cum* the Defendant ſuch a Day and Year aſſaulted the Plaintiff; the Declaration is erroneous. 3 *Crooke* 507. *Burſer's* Caſe. 2 *Bulſtr.* 215. and by *Sanders*, *quod cum* in Treſpaſs makes it naught after a Verdict, and that a general Demurrer to ſuch a Declaration is ſufficient. Neither is it good in Battery. So 1 *Keb.* 130. *Shepard* and *Tompkins*. *Vide* this Point of the *quod cum, &c.* well argued and reſolved in 2 *Bulſt.* 214. *Sherland* and *Eaton*.

Of alia Enormia ei intulit *how to be extended.*

Treſpaſs *quare Clauſum fregit & alia Enormia ei intulit*, this difference was taken neatly; When Damage ariſeth *ex turpi Cauſa* (as for Injury done to the Daughter of the Plaintiff under Colour of Marriage-Courtſhip) it may be given in Evidence upon ſuch general Declaration of *alia Enormia*; but in all other Caſes of Treſpaſs, the ſpecial Matter for which Damages ſhall be given ought to be pleaded; as Treſpaſs for taking an Horſe, no Evidence ſhall be for other Matter than what is expreſt in the Declaration. *Siderf.* p. 225. *Mich.* 16 *Car.* 2. *B. R. Sipporn* and *Baſſet*.

Ad tunc & ibidem *how expounded.*

Plaintiff declares that the Defendant 31 *Maij* 13 *Jac. apud London.* in ſuch a Pariſh, aſſaulted him, and *adtunc & ibid.* beat and wounded him, and a Bag of the value of twelve Pence from the Plaintiff with an hundred Pounds in Money therein took and carried away, *& alia Enormia, &c.* and doth not ſay, *tunc & ibid. cepit, &c.* and ſo no

time

time and place mentioned of the carrying away, &c. but *per Cur.* it's well enough; for (*Et*) accouples it with the time and place of the Battery, *Cro. Jac.* 443. *Taylor* and *Welſtead.*

Declaration that the Defendant *Die Auguſti* aſſaulted him, omitting the Day of the Month, though the Declaration on the Imparlance-Roll was perfect, and Judgment given for the Plaintiff; but it was adjudged to be Error and not amendable, 2 *Rols Rep.* 152. *Bicroft's* Caſe.

The Plaintiff declares againſt two Defendants, againſt one of them for an Aſſault and Battery, and againſt the other for taking away his Goods, *Per Cur.* the two Defendants cannot be joined together in one Action, becauſe the Treſpaſſes are of ſeveral Natures and againſt ſeveral Perſons, and the Parties cannot plead to this Declaration, *Stiles Rep.* 153. *Cutſworth's* Caſe.

Treſpaſs of a Judgment in *Hull*-Court, the Caſe was this; the Plaint was entred 15 *Dec. W. & M.* and Proceſs returnable *ad prox. Cur.* 8 *Jan.* at which Court the Plaintiff counts that the Defendant erected an Edifice there, by which the Lights in the Plaintiff's ancient Meſſuage were *ſtupat. & obſtruct. uſque Levationem querelæ & adhuc exiſtunt.* The Defendant there pleads *Non cul.* and the Cauſe continued there until 7 *Maij*, and then it was removed by *Habeas Corpus* and *Certiorari* in *B. R. & ſuper hoc ulterior proceſſus eadem Curia ceſſavit*, and after it is entred there *ſtea ad Cur. Villæ prædict. tent. coram Majore*, &c. and ſaith not at what Day. Comes the Plaintiff and brought a *Procedendo*, and a Trial there was and had, and Verdict and Judgment *pro Quer.* Error aſſigned, that it appears by the Record that the Action commenced 15 *Dec.* when the Plaint was levied, and the Declaration was not till the 9th of *January*, and then he counts of the con-

tinuance of the Nuſance *adhuc*, and ſo counts for Damages after the Suit commenced, and ſo they are given by the Jury generally, and by it for more time than they ought to have done. But *per Cur. adhuc* in the Count refers to the time in the Plaint, and the Count and the Plaint to this Purpoſe are all one; and the Preſidents are *adhuc debet, adhuc detinet, nondum ſolvit*, in caſe for ſtopping a Way; by which *adtunc & adhuc* he loſt his Way. *Co. Ent.* 11. b. 13. a. 14, 15. 3 *Levinz* 345. *Carter* and *Canthorp.*

In Treſpaſs in the Common Bench the Declaration muſt be, *Attachiatus fuit ad reſpondend.* if it be *Summonitus* it is but Form, and aided after a Verdict. 1 *Cro.* 41. 2 *Cro.* 85, 108.

In the King's Bench the Form is, A. B. *queritur de* C. D. *in cuſtodia Marr. Mareſch. &c. de vi quod ipſe primo die, &c. Vi & Armis.*

Form of Declarations in the { *King's Bench, Common Pleas, Exchequer.*

Modus Intrandi 377, 378.

The Plaintiff need not make any Title in his Declaration in Treſpaſs, the ſame being a Poſſeſſory Action; as Treſpaſs *quare fœnum ſuum cepit*, he need not ſay this Hay was Tythe belonging to his Farm, and if he do it's Surpluſage; but if he do make a Title in the way of Evidence, he ought then to purſue the ſame and make it good. 2 *Bulſt.* 288. *Walmore* and *Bamford.*

Simul cum.

Treſpaſs by the Defendant *ſimul cum alijs. Reg. Entr.* 615, 619, 650. *Co. Entr.* 647. 8 *Rep.* 107.

Treſpaſs

Treſpaſs by the Defendant *ſimul cum Uxore. Ra. Entr.* 648.

Simul cum quodam J. S. *Clauſum ſuum fregit*, and of the Plaintiff's own ſhewing it appears the Action ought to be brought againſt another not named in the Writ; yet if Verdict paſs it's a *Feoffayle*. If the Declaration were *cum quibuſdam aliis ignotis*; it's good. 1 *Leon.* 41. *Henly* and *Broad. Stiles p.* 20. *Barker's* Caſe. It may be the Plaintiff cannot arreſt the other Treſpaſſors, and will do it when he can, and he may well proceed againſt them at divers times as he can take them; but if he have Satisfaction from any one of them, he cannot proceed againſt any of the reſt. *Id. ibid.*

But if in Treſpaſs againſt one, who pleads that the Treſpaſs was done by himſelf and one *B.* to whom the Plaintiff hath releaſed, and the Plaintiff traverſe the Releaſe, in that caſe, foraſmuch as the matter doth not appear upon the Plaintiff's own ſhewing, but comes in on the part of the Defendant and not denied by him, the Declaration is good enough, 1 *Leon. p.* 41. *Henly* and *Broad*, and the Action ſhall not abate. *Hobart p.* 199.

If a Man bring an Action of Treſpaſs againſt A. *quod ipſe ſimul cum* B. *&* C. did the Treſpaſs, and doth not ſue them all, his Writ ſhall abate: as if four commit a Treſpaſs (which is in its nature joint and ſeveral) yet if the Plaintiff will bring his Action againſt one only, and declare that he with the other three did the Treſpaſs, his Action ſhall abate, it appears of his own ſhewing. *Hobart p.* 164, 199.

Treſpaſs againſt *J. S. ſimul cum aliis*, not naming them, is good. *Stiles Rep.* 15. *Tory's* Caſe, *p.* 20. *Barker* and *Martin.*

It was moved for the Plaintiff, that a Perſon named in the *ſimul cum* being a material Witneſs, might be ſtruck out, and it was granted. And by *Keeling*, if nothing was proved againſt him, he might be a Witneſs for the Defendant. *Modern Rep. p.* 11.

Form of a Declaration in the *ſimul cum*, wherein the Place is expreſſed where the Treſpaſs was committed, according to a Rule in Court. *Mod. Entr. p.* 383.

Continuando.

Diſſeiſee ſhall have Action of Treſpaſs againſt the Diſſeiſor, and recover his Damages for the firſt Entry without Re-entry; but after Re-entry he may have an Action of Treſpaſs with a *Continuando* and recover as well for all the mean occupation as for the firſt Entry. *Co. Lit.* 257. a. †. But if the Eſtate be determined by Act of God or Limitation, he ſhall have his Treſpaſs with a *Continuando* without Re-entry. 2 *Rolls Abr.* 550.

Treſpaſs *quare Clauſum fregit* 20 *Junij*, *Anno* 3 *Jac. continuando* until 6 *Nov. puis* general Pardon pardons all before 25 *Sept.* yet the Entry (after Verdict *pro Quer.*) was *nil de fine quia pardonatur*; for the firſt Entry in the Treſpaſs being only *vi & armis*, this being pardoned, all that depends upon this is pardoned; for the firſt Entry makes the Treſpaſs, and the *continuando quoad depaſturat.* is added to increaſe Damage. *Yelv. p.* 126. *Strickland* and *Thorp.*

Treſpaſs for breaking his Cloſe, ſpoiling his Graſs, turning up his Soil and 200 Poſts in *ſolo fixas eradication. & abcarriation. continuando tranſgreſ. præd. uſque* ſuch a Day after, and upon *non cul.* Verdict *pro Quer.* and enters Damages and Judgment *pro Quer.* and Error brought becauſe no

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continuendo can be of the Poſts. *Curia contra.* When the *contin.* is of the Treſpaſs *præd.* generally, and the Treſpaſſes conſiſt of ſeveral parts, and of ſome of them a *continuando* may be, and of ſome not, the *contin.* refers only to thoſe of which a *contin.* may be, and not to the others; but if the *continuando* had been particularly of the Poſts, it would be otherwiſe: and Judgment was affirmed. 3 *Levinz* 93. *Gillam* and *Clayton.*

Treſpaſs for Piſcation in his ſeveral Piſchary, and taking 100 Buſhel of Oyſters at one Day, the Piſcation, Caption and Aſportation of the Oyſters *diverſis diebus & vicibus* until another Day *continuando.* Upon Not Guilty, found *pro Quer.* and entire Damages given. It was moved in arreſt of Judgment, that the Declaration for the Caption and Aſportation of the Oyſters was ill in the *continuando,* not expreſſing any certain Quantity, therefore the Damages entire made the Verdict vitious. Judgment *quod Quer. nil cap. per Billam.* Sir *T. Jones* 109. *Hevell* and *Reynolds.*

Treſpaſs by Men and Beaſts with a *continuando,* and Verdict for the Plaintiff, and Damages *pro Tranſgreſſione prædicta*; it was moved in arreſt of Judgment, becauſe Treſpaſs by Men may not be with a *continuando*; yet *per Cur'* it's good after a Verdict; and Damages ſhall be intended to be given for the Treſpaſs which may be with a *continuando. Siderf. p.* 379. *Pave* and *Brown.*

Treſpaſs for caſting in Logs into the Plaintiff's Cloſe, *continuand. Tranſgreſſionem prædictam*; which may not be, it being the Act of a Man; and it's not like Beaſts which continue on the Land. *Siderf.* 224, 249. *Lichford* and *Elliot.* 1 *Keb.*

In Treſpaſs for breaking his Cloſe, digging Coals, and taking away 40 Loads of Coals, and laid the Treſpaſs 1 *July* 14 *Car.* until *No.* 15 *Car.* with a *continuando diverſis Diebus & Vicibus*;

but the Plaintiff could prove no Re-entry, and ſo could recover no more but for the firſt Entry, and nothing for the Coals taken away; but that is a diſtinct Treſpaſs, and a new Action lies. At a Trial before Judge *Henden.*

Treſpaſs with a *continuando* for 500 Years, it's not Error: he ought to have pleaded the Statute of Limitations. *Siderfin p.* 253.

Continuando tranſgreſſionem prædict. quoad aſportationem hordei & gran. præd. from ſuch a day to ſuch a day, it's Error; for ſuch a Treſpaſs may not be with a *continuando*: but if it had been *continuand. tranſgreſſion. prædict.* without enumerating the Treſpaſs, it had been good: yet after a Verdict it ſhall be Surpluſage, and all the Damages ſhall be given for the Entry reſidue. *Siderf. p.* 319. *Mich.* 20 *Car.* 1. *Butler* and *Hodges.* This Caſe of *Butler* and *Hodges* is well reported in 1 *Levinz* 210. the Plaintiff lays the Treſpaſs the firſt of *April* of the taking ten Loads of Wheat, ten Loads of Barley, ten Loads of Oats, *continuando* the ſaid Treſpaſs from the firſt Day of *April* to the firſt day of *June.* It's Error; the Treſpaſs being laid that he took them the firſt of *April*, and ſo all in one Day, the *continuando* is ill; for that which is done the firſt of *April* cannot be done on another Day after: but he ought to have declared for ſo many Loads taken and carried away at one Day, and ſo many at another; and *Whichcot* and *Elliot's* Caſe, 16 *Car.* 2. was cited; but Judgment was affirmed. And it was ſaid, That after in *Whichcot's* Caſe Judgment was given *pro Quer.* it was agreed that for doing of a ſingle Act, which is to be done all at one time, and the killing of a Horſe the *continuando* is ill: but of divers things which may be done at divers times, as here, tho' the Treſpaſs be at firſt laid to be done the firſt Day, the *continuando* ſhall make a diſtribution of

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it, that part was done at one Day and part at another within the time, and Judgment was affirmed.

Treſpaſs *quare Clauſum fregit*, and depaſturing his Graſs, and ſubverting an hundred Piles there fixed, and carrying them away. Tranſgreſſion *predict. continuando* to the exhibiting the Bill. Verdict *pro Quer.* and Damages entire. Moved in arreſt that the *continuando* was impoſſible as it is alledged. *Ergo* entire Damages being given, the Verdict is vitious in the whole. But *per Cur.* the Verdict aids it, and that after Verdict the *continuando* ſhall be applied only to the depaſturing and ſpoiling his Graſs. So was the Caſe of *Lechford* and *Elliot*. *Vide ſupra.*

Treſpaſs for ſpoiling Corn in the Blade may be with a *continuando diverſis diebus & temporibus* for two Years, though there cannot be a continuance of ſuch a Treſpaſs for ſo long together. 2 *Rolls Abr.* 549. *King*'s Caſe cited in *Raym.* 396. *Nappier*'s Caſe.

Treſpaſs for carrying five hundred Loads of Barly may be with a *continuando. ibid. vid.* 2 *Keb.* 173, 203, 215.

Continuando is properly in Treſpaſs *quare Clauſum fregit* or *Domum fregit*, and not of an Horſe taken or Trees cut.

Treſpaſs with a *continuando* for five hundred Years, and it is *contra pacem Domini Regis nunc*, where the Treſpaſs was in the Reigns of ſeveral Kings. Yet it's not Error. *Siderf. p.* 253.

Treſpaſs with a *continuando*, a Preſident. *Plowd. Com.* 21. a. 38. b.

Narratio pur Cloſe debruſe & pur depaſturant avec avers cum continuando uſque diem exhibitionis Billæ. 1 *Sanders* 24.

Declaration for Cloſe broken, Graſs ſpoiled *Pedibus ambulando*, and for depaſturing with his Beaſts, with a *continuando* until the Bill exhibited. *The Form, Sanders* 1. *p.* 24.

Continuando does not lie of Gorze.

A Treſpaſs *de blees in bladis* may be with a *continuando.*

A Treſpaſs of Goods carried away may be with a *continuando.*

A Treſpaſs *quare equum cepit* may not be with a *continuando.* 2 *Rolls Abr.* 549. a.

Tranſ. with a *continuando*, the Plaintiff could not prove the firſt Treſpaſs, though the *diverſis vicibus* after he could prove, and was Nonſuit at a Trial before Judge *Thorp.*

Treſpaſs is laid 1 *Octob. continuando* the ſaid Treſpaſs *a prædicto primo Septembris* to a Year after. This being but a Miſtake in the Aggravation of Damages, and the main Treſpaſs being tried, the Court conceived it well enough, and the Damages ſhall be intended for the principal Entry, the other being repugnant and impoſſible. 2 *Keb.* 407. *Pain* and *Brown.*

Treſpaſs is laid the 26th of *May*, *continuando* to the 30th. Defendant juſtifies the 26 *May* for way to his Common, and ſaith nothing to the *continuando. Per Cur.* it's well enough, becauſe the principal Treſpaſs being anſwered, the *Continuando* is but for Aggravation of Damages. 2 *Keb.* 167. *Cateſby* and *Daniel.*

Upon the Evidence it is not needful to prove a Re-enty if the Action be brought againſt the firſt Treſpaſſor, as it muſt be where it is againſt a Stranger as Feoffee of the firſt Treſpaſſor.

Treſpaſs of throwing down Hedges with a *continuando* is good: though of breaking a Houſe or Cloſe, or cutting Trees theſe is no ſuch continuance

ance, importing only one ſingle Act. 3 *Keb.* p. 250. *Roſe* and *King*.

The Plaintiff declares with a *continuando uſque diem impetrationis brevis*, (*viz.*) the 18th Day of *March*, where the *Teſte* of the Writ was the ſecond Day of *January*. The Defendant pleads to Iſſue, and found for the Plaintiff, this Miſpriſion of the *Teſte* could not be amended. 1 *Leon.* p. 81.

It appeared not by the *continuando* how long the Treſpaſs continued, *Windham* it is *diverſis diebus & vicibus*, and the continuance is but in Aggravation of the Treſpaſs, and the Action it ſelf is for the firſt Treſpaſs, which is the Original. *Stiles* 171. *Ireland* and *Michelbourne*.

CAP.

CAP. VII.

Having ſet down ſeveral general Notes about Declarations in Treſpaſs, I ſhall now come to the particular ſorts of Treſpaſſes; but before I do that, I ſhall ſhew what Perſons may have Treſpaſs and for what, and againſt what Perſons this Action may be brought and for what, and hint at the Pleading thereon, and ſubjoin a Reference to Preſidents of Writs or particular Declarations appliable thereunto.

What Perſons ſhall have Treſpaſs, and for what.

Baron, Baron and Feme.

A Man may bring an Action for the Battery of his Wife, and the Wife not be joined with him. 2 *Rolls Abr.* 556. 15, 16.

Battery againſt Baron and Feme, the Defendant appeared in *propria Perſona*, and the Wife was in *cuſtodia*, and ſo the Plaintiff declares againſt them. It's not good; for the Husband ought to put in Bail for his Wife. *Stiles Rep.* 216. *Maibdit.*

Treſpaſs of Aſſault and Battery, for that the Defendant did beat, aſſault and wound the Plaintiff, *nec non* for that he aſſaulted and beat the Wife of the Plaintiff, *per quod Conſortium Uxoris ſuæ pur* three days *amiſit. Per Cur.* the Action is well brought by the Husband; for it is not brought in reſpect of the Harm done to the Wife, but it is brought for the particular Loſs of the Husband's

Cro.

Cro. Jac. 501. *Guy* and *Liveſey*, 2 *Rolls Rep.* 51. *meſme caſe.*

C. brought an Action for the Battery of his Wife, *per quod negotia ſua infecta remanſerunt*; and had Judgment to recover. *Chomley*'s Caſe cited in *Guy* and *Liveſey*'s Caſe.

Baron and Feme join in Treſpaſs for the Battery of the Wife, and ſo for the Impriſonment of the Wife: the Baron may ſay *ad dampnum ipſius* or *ad dampnum ipſorum Reg.* 185. b. *Lib. Intr.* 610, 688. *Hetly p.* 2. *Siderfin p.* 387. *Horton*'s Caſe. *Vide Stiles Rep. p.* 129. *Stradling* verſus *Bowman Yel.* 89. *Higgins*'s Caſe.

If Baron and Feme join for the Batte[illegible]f both, this ſhall abate for the Battery of the [illegible]usband. 9 *Ed.* 4. 54. *Survey del Ley*, 331. 2 *Rolls Rep* 51.

If Baron and Feme are beaten, they ſhall have ſeveral Actions.

Treſpaſs for beating and taking away of Goods, the Writ ſhall ſay *de bonis viri*, for the Wife may not have Property *durante coopertura. Reg. Orig.* 105. b.

Baron and Feme brought Treſpaſs for the Battery of the Wife and taking away the Goods of the Husband only, *ad dampnum ipſorum*, and it was held to be ill. *Hetly p.* 2. *Thomas*'s Caſe.

Baron and Feme ought not to join in Treſpaſs for the Battery of the Wife and tearing the Coat of the Wife; and it was *ad dampnum ipſorum*, which ought not to be. In Actions for Wrongs which ſhall ſurvive to the Wife, Baron and Feme ſhall join, and in no other Caſe. *Siderfin p.* 224. *Staunton* and *Hobart*, *p.* 387. *Vide* 1 *Keb.* 278. 781.

Baron and Feme may be charged with a Joint-Battery or Impriſonment, but not in Trover and Con-

Converſion. *Crok. Jac. p.* 661. *Berry* againſt *Nevis.*

Baron and Feme may join in Treſpaſs *de Clauſo fracto* and cutting their Graſs. So they may join for the taking away 20 Loads of Hay *inde provenien.* though it be a Chattel ſevered from the Inheritance and veſted in the Husband. *Cro. Eliz. p.* 96. *Cookſon* and *Caſtline.*

J. M. and *M. Uxor ejus* brought Treſpaſs *quare Clauſum fregit, Herbam ſuam meſſuit, &c.* Exception was taken, that it was not the Hay of the Wife, nor ſhe was not damnified by it, but her Husband. By *Wray* the Declaration is good enough; for though it be not good for the Hay, yet *Clauſum fregit* makes it good. 1 *Leon.* 105. *Wilkes* and *Perſons.*

For Treſpaſs done to the Wife before or after Marriage, they muſt join, except the beating the Wife during the Coverture be ſo great, that he *Conſortium ſuum amiſit*, then he may ſue alone.

A Feme covert (in the Abſence of her Husband, he being beyond Sea) may bring Action of Treſpaſs for Aſſault and Battery made on her, in her own and her Husband's Name; but not *e contra.* 1 *Bulſtr.* 140. *Anonymus.*

Roſe E. brought Tranſ. againſt *P.* for putting in Beaſts into her Land, *&c.* 1 *May, continuando uſque January*, and on Not Guilty pleaded, had Judgment. *P.* alledgeth for Error; Error in fact, that the ſaid *Roſe* was Covert Baron the ſaid firſt day of *May* and for a Week after. *Per Cur.* it's no Error; for the Wife ſhall have Treſpaſs for a Treſpaſs committed on the Land of the Wife during the Coverture, and Damages ſhall go with the Action. 2 *Rolls Rep.* 264. *Peeter* againſt *Roſe Edmunds. Palmer Rep.* 313.

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In Treſpaſs *quare Clauſum fregit* brought by Baron and Feme, they may join; for *per Curiam*, it ſhall be intended they are Jointenants. 1 *Bulſtr.* 110. *Maynard & Uxor* againſt *Tower.*

Lord *Coke* ſaid when he was Reporter in C. B. the Husband was to be amerced, and for the Battery of the Wife, Judgment to be *quod capiantur.* 2 *Bulſtr.* 151.

If Cauſe of Action ariſe before Coverture, though but Treſpaſs where only Damages are recoverable, they muſt join. 1 *Keb.* 440. *Hardy* and *Robinſon.*

B. procured *J. S.* to ſue him and his Wife in an Action of Goods taken away by her, and had Judgment by Confeſſion of the Husband, which the Court ſet aſide as illegal: but if it had been tried in Iſſue, *J. S.* might have taken both. 1 *Keb.* 637. *Bradely* and his Wife.

Treſpaſs of Aſſault, Battery and Impriſonment of the Wife untill the Husband paid eleven Pounds, *ad dampnum ipſorum*; it's good. 2 *Keb.* 230. *Browne* and *Tripe.*

Baron and Feme Brought Action of Battery for the beating of them, *ad dampnum ipſorum*, it's ill. For the Battery of him ſhe cannot join, but for the other they may. This was on a general Verdict, had the Jury found the Battery or Damages joint or ſeveral it might be otherwiſe. 2 *Keb.* 269. *Jones* and *Ayloff.*

Baron and Feme brought Action for the Battery of the Wife, *ad dampnum ipſorum*, and good: for the Action and Damages ſhall ſurvive; and in all Caſes of Survivor the Action may be laid *ad dampnum ipſorum*: but in Actions for beating the Husband and Wife they cannot join nor conclude ſo. 2 *Keb.* 434. *Hort's* Caſe.

Treſpaſs

Treſpaſs by Baron and Feme for beating the Wife, and taking away from her an Apron and a Pinner, and the Verdict being general, *per. Cur.* the Judgment was ſtayed, for that the Feme cannot joyn as to the Goods, unleſs there had been ſeveral Pleas or ſeveral Damages. 2 *Keb.* 813. *Dunwell* and *Marſhall.*

Ad Actionem de captu Uxor' Quer' &c. Bar quod diverſæ lites & controverſiæ ortæ fuer' inter Quer' & S. Uxor. ejus quæ proſecut' fuit quer' in Curia Chriſtianitatis, quodq; ipſe Def. ad requiſitionem dicte S. ipſam per manum ſuam cepit & ſalvo & honeſte conduxit illam ad eandem Curiam & retrorſum ad hoſpitium ſuum quouſque ſecta illa determinata fuit quæ ſunt ead. raptus & abductio, &c. 2 Browne 282.

Treſpaſs *verſus* Baron and Feme *de Clauſo fracto* of the Baron's, and for the Battery of the Wife, *ad dampnum ipſorum.* They cannot join in Treſpaſs *de Clauſo fracto* of the Baron's, but for the Battery of the Feme they may, therefore the Declaration is ill. *Quære* if Verdict may make it good. *Cro. Jac. p.* 655. *Buckly* and *Hale. Vide* this Caſe in *Palm.* 338. two Judges againſt two, as to the *dampnum ipſorum.*

Aſſault and Battery againſt Baron and Feme for Battery by the Feme, they are found Guilty; the *Quod Capiatur* ſhall be againſt the Baron only. *Cro. Car.* 513. *Anonymus.*

Aſſault and Battery brought by the Plaintiff and his Wife againſt the Defendant and his Wife. The Jury found *quoad* the beating of the Plaintiff's Wife only, that the Defendants are Guilty, and *quoad reſid.* they find for the Defendants. Moved, That the Declaration was not good, becauſe the Husband joins with his Wife: for as to the Battery made upon him he ought to have brought his Action alone. But *per Cur.* the Declaration is cured

cured by the Verdict. 2 *Mod.* 66. *Hocket & Ux'* verſus *Stiddolf & Ux'*.

Treſpaſs by Baron and Feme for breaking the Cloſe of the Baron *ad dampnum eorum.* The Declaration is not good, nor aided by any Statute. *Cro. Jac.* 437. *Marſhall* and *Doyle.*

In Treſpaſs by Baron and Feme of a Cloſe broken, *& bona ſua capt.* and Accounts of a Treſpaſs made to the Wife *dum ſola fuit*, this ſhall abate the Writ. *Dyer* 84. *pl.* 80.

The Husband only may have Treſpaſs for Deeds concerning the Land of the Wife. 8 *H.* 5. 9. *pl.* 13.

So the Husband alone ſhall have Treſpaſs upon the Stat. 5 *R.* 2. *c.* 7. becauſe he only ſhall have Damages. 38 *H.* 6. *pl.* 9. 4 *Ed.* 4. 13.

Baron and Feme Executrix to *B.* join in Treſpaſs for taking of the Goods *durante coopertura.* 21 *Ed.* 4. 5. *per Littleton.*

Tranſgr. brought by the Husband for beating his Wife, whereby ſhe died, lies not, becauſe it is Felony. *Stiles p.* 347. *Higgins's* Caſe cited there.

Treſpaſs made to a Feme Sole, who after takes Husband, they ſhall have Treſpaſs in their Names, and it ſhall be *Bona & Catalla* or *Clauſum* of the Wife. *Vent. Entr.* 220. *Dyer* 305. b.

Pro Viro & uxore de Warrena Uxoris fugat. & leporibus & cuniculis capt. 43 Ed. 3. 13. Ra. Entr. 650.

Treſpaſs for that the Defendant made an Aſſault upon *Elizabeth* the Plaintiff's Wife, *& illam verberavit & male tractavit, nec non* the ſaid *Elizabeth ſimul cum* one Gown, *&c.* of the Goods of the Plaintiff, *ſimul cum* the ſaid *Elizabeth apud D. tunc & ibid. cepit & abduxit & abcarriavit, nec non eandem Elizabetham per quinque annos ab eodem le Plaintiff detinuit & cuſtodivit per quod*

le

le Plaintiff ſolamen & conſortium, nec non conſilium & auxilium in rebus domeſticis quæidem le Plaintiff habere debuiſſet & potuiſſet cum Uxore ſua per tot. tempus prædict. perdidit & amiſit & alia Enormia, &c. found for the Plaintiff, and Damages 300 *l.* Error brought,

1. Becauſe the Action was brought by the Baron only for the Battery of his Wife, which ought not to be, and then the Damages being entirely given, the Judgment is erroneous. But *per Cur.* the Action here is not brought for the Battery of the Wife, but for the Loſs and Damage of the Husband for want of her Company and Aid; and all is concluded with the *per quod, &c.* which extends to all that was before.

2. Becauſe it is *cepit & abduxit*, where it ſhould be *rapuit*, according to the Regiſter; but it's good either way. *Cro. Jac. p.* 538. *Hyde* and *Seyſſor. Weſtm.* 2. *cap.* 34. *Lib. Intr.* 662. but in the Count the Plaintiff ought to ſhew the Goods in certain, 2 *Rolls Abr.* 551.

The Husband ſhall have this Action although his Wife die: for in this Action he ſhall not recover his Wife but Damages. 2 *Inſt. p.* 434. He cannot have an Action for taking her as his Servant, becauſe the Law gives him an Action in another form. *Weſtm.* 1. *c.* 13. *Weſtm.* 2. *c.* 34. In the Original Writ *de Uxore abducta cum bonis Viri*, it is concluded *contra formam Statuti in hujuſmodi Caſu proviſi, i. e. Weſtm.* 1. If the Writ be brought at Common Law, omitting theſe Words, *contra formam Statuti*, then it is, *ſi A. fecerit, &c. tunc pone, &c.* but if on the Stat. it is *tunc Attachies*, Dyer 256. *pl.* 10. *Stiles p.* 44.

Baron and Feme brought an Action of Treſpaſs *quare Clauſum fregit*, and for Battery of the Wife, Q. if the Writ ſhall abate; for as to the *Clauſum fregit*

fregit, the Wife had no Cauſe of Action; or whether the Plaintiff ſhall have Judgment for part. *Hutton p.* 59. *Anonymus.*

Declaration by Baron and Feme for Aſſault and Battery made to the Feme, and that the Defendant *alia Enormia eis intulit*, which ought not to be; for it was a perſonal Wrong to the Feme. *Cro. Jac.* 664. *contra. Stiles p.* 236. *Wats's* Caſe, *Treſpaſs againſt Baron and Feme.*

If the Wife beat another, the Huſband ought to be named in the Writ. *Reg. Orig.* 105. b. *Lib. Itrat.* 612. A. § 11.

Baron and Feme may be charged with a Joint-Battery or Impriſonment; but not for Goods in Trover converted to their Uſe. *Cro. Jac.* 661. *Berry's* Caſe.

Baron and Feme brought Aſſault and Battery againſt Baron and Feme for Battery of the Wife of the Plaintiff. It was found, the Husband Not Guilty, and the Wife Guilty; and Judgment was *quod capiantur*, and good. *Cro. Jac.* 203. *Hales* Caſe, 22 *Aſſ.* 57. *contra.*

In Battery againſt Baron and Feme, the Huſband juſtifies in aid of the Wife; the Wife pleads *ſon Aſſault demeſne*; both Iſſues were found for the Plaintiff, and Damages entirely given. *Per Cur.* the Trial was ill; for the Wife by her ſelf cannot plead; and the Damages being entirely aſſeſſed, all was ill: a Repleader awarded. *Cro. Jac. p.* 239. *Watſon* againſt *Thorpe* and his Wife. *Vid.* 1 *Brownl.* 188. *Hernpleds* 393.

Preſidents of Aſſault and Battery againſt a Man and his Wife, the Man pleads *non culp.* and the Wife pleads *ſon aſſault demeſne.*

Verſus Virum & Uxorem de inſultu per Uxorem. Hern. pled. 393.

The Husband ſhall never be charged by the Act or Default of his Wife, but when he is made a Party to the Action, and Judgment given againſt him and his Wife; as for the Debt of the Wife or Treſpaſs done by her, *&c.* the Action of Debt or Treſpaſs ſhall be brought againſt Baron and Feme, and the Husband ſhall plead, *&c.* and ſhall be party to the Judgment. 11 *Rep.* 61. b. in Dr. *Foſter's* Caſe.

Treſpaſs *de muliere abducta cum bonis, &c.* lies againſt Baron and Feme. *Survey del Ley,* 342.

Treſpaſs is made by a Feme Sole, who after marries; her Husband ſhall be named with her for Conformity, and he ſhall ſatisfie the Damages and the Declaration. *Vide Co. Entr.* 67. b. *Hobart p.* 96.

Treſpaſs againſt Baron and Feme *dum ſola fuit,* both are found guilty, it ſhall be *capiantur pro fine. Hetley p.* 53. in *Johnſon's* Caſe.

In Treſpaſs againſt Baron and Feme of Treſpaſs *dum ſola,* Iſſue, *quod ipſi ſunt inde culpab.* is void, but the Judgment good. 3 *Keb.* 646. It ſhould have been, *quod ipſa non eſt culpab.* 2 *Cro.* 6. 3 *Cro.* 883. 2 *Rolls* 62.

Baron and Feme are ſued for the *Tort* of the Feme. *Cro. Jac. p.* 5. *Cox* and *Cropwell.*

Treſpaſs againſt Baron and Feme, the Wife is taken by *Capias,* but not the Husband, the Declaration ſhall be put in againſt Baron and Feme, and the Wife appearing ſhall be committed to Priſon. *Mich.* 15 *Jac. B. R. Aſhwell* verſus *Oſſhard.*

The Count was againſt Baron and Feme of Treſpaſs done *cum averijs ſuis,* and good, and doth not ſay whether they were their Beaſts after or before Coverture. 1 *Keb.* 944. *Collingwood* and *Biſhop.*

If

If a Servant be beaten the Maſter ſhall have Treſpaſs, and ſo ſhall the Servant too, though he be a Servant at will. 1 *Anderſon* 13. *Armſtede's* Caſe, 9 *Rep.* 113. 10 *Rep.* 130. By Maſter. Servant.

If a Servant be beaten, the Maſter ſhall have an Action, but the Battery ought to be ſo great *per quod Servitium ſuum amiſit*; but for every little Battery the Servant ſhall have an Action. 9 *Rep.* 113. a. the Count ought to ſay, *per quod Servitium ſuum amiſit. Lib. Entr.* 613. b. *ſect.* 19. the form of the Count and Bar, *quod non retentus fuit cum querent. Ra. Entr.* 647.

As for the Count, the Plaintiff need not count upon the Reteyner, or ſhew how Servant or Apprentice. *Stile* 94. *More* and *Stone.* 2 *Bulſtr.* 198.

Treſpaſs *quare vi & armis cepit & abduxit* ſuch an one his Servant; the Action doth not lie if the Defendant privately retained him, and had no Notice to whom he appertained. *Aliter* if the Retainer were at Seſſions. *Winch. p.* 51.

If a Man beat my Servant, and after he dies, yet I ſhall have Action of Treſpaſs. *Aliter* if it were my Wife. 2 *Rolls Abr.* 568. o. 2, 3. *Nelv. p.* 89. 90. *contra vid.*

Treſpaſs for taking away his Apprentice. *Nat. bre.* 91. *I.* 8 *H.* 6. 18. 21 *H.* 6. 31.

A Servant which is commanded to carry Goods to ſuch a Place, ſhall have an Action of Treſpaſs. 1 *H.* 6. 4. 19 *H.* 6. 34. *Co.* 13 *Rep. Heydon* and *Smith.*

In Treſpaſs for beating his Servant, it's not neceſſary he be an hired Servant *ſecund.* 5 *Eliz.* if he be hired for ſome time, though leſs than an Year, it's ſufficient. At a Tryal before Judge *Thorp.*

For threatning my Servant *per quod, &c. Ra. Entr.* 661, 662.

De Apprentitio abducto. Reg. 109. 21 H. 6. 31. 22 H. 6. 30.

Aſſault and Battery of my Servant *per quod, &c.* *Reg. Orig.* 102. *N. B.* 91. *I.*

Tranſ. de Serviente verberato. Repl. Non fuit retent. cum quer. Ra. Entr. 674.

Battery, Maheym and Impriſonment *per quod, &c.* Treſpaſs lies. *Ra. Entr.* 342.

For enticing my Servant to depart Treſpaſs lies not, but Action on the Caſe. 2 *Rolls Abr.* 566. 11, 12.

If a Servant depart out of my Service, no Action of Treſpaſs lies againſt him. 2 *Rolls Abr.* 556. 13.

Treſpaſs *per quod Servitium ſuum amiſit*; if the Battery be juſtified, he need not anſwer to the loſs of the Service, for that is but a Conſequent of the Battery.

If one be erecting a Nuſance againſt me, and I thruſt away his Servants, *&c.* I may plead *non culp.* for this cannot be loſs of Service. 1 *Rolls Rep. p.* 393. *Norris* and *Baker.*

By the King. The King ſhall have Treſpaſs *quare Clauſum fregit*, but in this Caſe the Party may not make Fine. *Nat. B.* 9. *Regiſt.* 99. a. 10 *H.* 4. 3.

But for Treſpaſs in the Lands of the King it's uſual to have an Information in the Exchequer, *&c.* the Judgment in ſuch Caſe *vide N. B.* 90. *l. Plow. Com.* 561.

The King, who hath Profits of Land by Outlawry, ſhall have Treſpaſs, or take the Goods Damage Feaſant. *Co.* 13 *Rep. p.* 69.

Tranſ. *pro Rege de Chacea fugat. & Damis capt. Ra. Entr.* 650.

The Grantee or Patentee of the King, *de Herbagio Foreſtæ*, ſhall have an Action againſt any who

who conſumes or deſtroys the Graſs, but not Trees. *Dier* 285. *pl.* 40.

The Queen ſhall have Treſpaſs without the King.

If nine parts of the Corn are ſevered for Tythes, the Parſon ſhall have Treſpaſs againſt him that takes them before Seizure: but not of a Mortuary before Seizure. *Plowd. Comment.* 281. a. in *Fox* and *Greisbrook.* By a Parſon.

Parſon or Vicar ſhall have Treſpaſs for the Walls or Glaſs of the Church, or for Graſs or Trees in the Chuch-Yard, or in the Glebe-Land. 11 *H.* 4. 12. 8 *H.* 6. 9. 11 *H.* 6. 4.

Parſon imparſonee ſhall have Treſpaſs againſt any who is admitted and inducted into his Church, if he intermeddle with the Glebe or Tythes. *Plowd. Com. fo.* 500. b. 38 *H.* 6. 24. 39 *H.* 6. 21, 27.

The Parſon of a Church ſhall have Treſpaſs *pro Piſcharia Reg.* 103.

De averijs diſtrictis in Feodo Eccleſiæ. Reg. 100.

De via impedita ad decimas aſportandas. Reg. 105.

Church-Wardens ſhall have Treſpaſs for the Goods of the Church taken away in their time or the Time of their Predeceſſors, *ad Dampnum Parochianorum.* It's a good Plea that they are not Church-Wardens. *Survey de Ley,* 335. *N. B.* 91. k. *Cro. Eliz. p.* 179. *Hadman* and *Ringwood.* By Church-Wardens.

Church-Wardens may bring Treſpaſs for the taking away of a Bell. *Cro. Eliz.* 145, 179. *Hadman* and *Ringwood.* And it lies by the Succeſſor Church-Warden. *p. ibid.*

Church-Wardens brought Treſpaſs *de Charta Annuitatis in cuſtodia ſua lacerat. & Sigill. fract.* Ra. Entr. 7. 619.

Pro Guardianis Eccleſiæ de bonis capt. Dig. 196.

For a Wrong done in the Church-Yard the Parſon ſhall have the Action.

By Mayor and Commonalty.

Mayor and Commonalty ſhall have Treſpaſs. *Vide le Count in Hern.* 809.

By Dean and Chapter.

Dean and Chapter brought Treſpaſs for entring into the Cloſe of the Dean, it was held not good; for this Action being brought for the Poſſeſſions of the Dean only, the Chapter was not to join. *Cro. Eliz. Welley* and *Robinſon.*

By Biſhop.

Treſpaſs *per Epiſcopum de Arboribus ſucciſ. tempore vacationis.* Reg. 101, 125.

By Ordinary.

The Ordinary ſhall have Treſpaſs for Goods of the Inteſtate taken out of his Poſſeſſion. *N. B.* 91, *M.*

By Heir.

The Heir ſhall have Treſpaſs for taking of a Deed concerning Land to him deſcended. 1 *Ed.* 3. 18. *Pl.* 11. 43 *Ed.* 3. 24. *Pl.* 3. But not againſt an Executor for taking a Box with Deeds.

It lies againſt an Executor for taking Fiſh out of a Pond.

The Heir ſhall have an Action of Treſpaſs againſt an Executor for taking away a Furnace or Pales fixt. 21 *H.* 7. 26. *Pl.* 4.

So for taking Fiſhes out of a Pond. So for Deer or Pigeons. *Survey de Ley*, 336.

The Heir ſhall not have Action of Treſpaſs before he enter, in caſe of Lands deſcended to him. *Vide prius.*

Executor

Executor ſhall have Treſpaſs *per* 4 *Ed.* 3. *cap.* 6. and 31 *Ed.* 3. gives the ſame Remedy to an Adminiſtrator. by the Equity of the Stat. 4 *Ed.* 3. *c.* 6. 14 *H.* 7. 13. 24 *H.* 7. 101. b. *Pl.* 2. By Executor.

Executor ſhall have Treſpaſs for Goods and Beaſts taken out of the Poſſeſſion of the Teſtator. *Vide Le Count. Ra. Entr.* 640. A. *ſect.* 2. *N. B.* 87 *E. Reg.* 98. a. 92. but not *de Clauſo fracto*, nor *de Arboribus ſucciſis tempore Teſtatoris*; he ſhall ſay *bona Teſtatoris*. 3 *Bulſtr.* 11.

At this day Executor of Executor ſhall have ſuch Action. *Reg.* 98. A. *Plowd. Com.* 290. a. though formerly the contrary was held. As ſee there, and 2 *Rolls Abr.* 568. o. 1. If Treſpaſs be done to the Goods of the Teſtator in the Hands of the Executor, and the Executor after dies, his Executor ſhall not have Treſpaſs.

If the Executor ſue for Goods taken out of the Poſſeſſion of the Teſtator, this Writ may not ſay *ad grave dampnum, neque in retardationem, &c. Fitzherb. N. B.* 87. *Reg.* 98.

Executor ſhall have Action of Treſpaſs before Probate, if any take the Goods before the Executor ſeize them; for he had Property in them by being made Executor. *Plowd.* 281. a. 2 *Bulſtr.* 268. *Fiſher* verſus *Young*.

Executor ſhall have Treſpaſs *de bonis Teſtatoris in cuſtod. ſua exiſten.* as *ut de billa obligatoria, de bove in teſtati ſub cuſtod. adminiſtratoris capt.* Ra. Entr. 649. and ſhall ſay, *bona ſua*. 3 *Bulſtr.* 11. *Reg. Orig.* 94. a. 2 *H.* 7. 15. 6 *Ed.* 4. 1. 14 *H.* 4. 29. *Her.* 504. 3 *Bulſtr.* 472.

A. adminiſters *de bonis* B. C. proves a Will by which he was made Executor. C. may have Treſpaſs againſt A. for the Goods, notwithſtanding Adminiſtration was not repealed. *Mich.* 12 *Jac.* B. R. *Fiſher* and *Young*. 2 *Bulſtr.* 268.

Executor of the Leſſee ſhall have Treſpaſs againſt the Leſſor who ejects him; and the Writ ſhall be *ſummoneas per bonos ſumm. &c.* but if he eject him and take Goods within the Land, the Writ ſhall be *pone per vad. & pleg. Reg. Or.* 102. b. 97.

Pro Executore de ingreſſu poſt Mortem Teſtatoris in terris dimiſſ. teſtatori per Defend. Reg. 97. 102.

Executor brings Treſpaſs againſt *J. H.* for that he took and chaſed, *&c.* two Oxen, which were the Teſtator's *tempore mortis ſuæ*, to the Damage of the Plaintiff, and in *retardatione Teſtamenti*: It was demurred to, becauſe it ſhould have been mentioned, the Goods were taken *extra cuſtodiam ſuam.* But *per Cur.* it's well enough. *Cro. Jac. p.* 113. *Adams* and *Cheverell.*

By Adminiſtrator.

Adminiſtrator ſhall have Treſpaſs for the Goods of the Inteſtate taken out of his own Poſſeſſion, and the Count. *Lib. Intra.* 649. d. ſ. 1. *Reg. Or.* 94. a. 22 *Ed.* 4. 112. *Pl.* 32.

Adminiſtrator ſhall have Treſpaſs for Goods taken out of the Poſſeſſion of the Inteſtate, *per Stat.* 4 *Ed.* 3. *c.* 7. and the Count, *Lib. Intr.* 640. a. ſ. 1. but not the Ordinary. *N. B.* 92. a. 14 *H.* 7. 13. *Cro. Eliz.* 384. *Smith's* Caſe.

Adminiſtrator ſhall have Treſpaſs or Trover before Adminiſtration committed to him (but not againſt him who juſtifies under the Ordinary.) 18 *H.* 6. 22. 36 *H.* 6. 8. a. *Reg. Orig.* 102. B. *Stiles Rep. p.* 341. *Long's* Caſe. For Adminiſtration doth relate to the time of the Death of the Inteſtate, and not to the time of granting of it.

Leſſor

By Leſſor. Leſſor ſhall have Action of Treſpaſs againſt Leſſee at will for voluntary Waſte before Entry; for this amounts in Law to a Determination of his Will. *Co. Lit.* 57. a.

If Tenant at Will grants over his Eſtate to another, and the Grantee entereth, he is a Diſſeiſor, and the Leſſor may have an Action of Treſpaſs *vi & armis* againſt the Grantee; for though the Grant was void, yet it amounts to a Determination of his Will. *Co. Lit.* 57. a.

Tenant for Years holds over his Term, and ſo becomes Tenant at Sufferance; Leſſor ſhall not have Action of Treſpaſs before Entry. *Co. Lit.* 57. b.

Leſſor excepts the Trees, he ſhall have Treſpaſs *quare Clauſum fregit.* 14 *H.* 8. 1. 8 *Rep.* 63. *Swayne's* Caſe.

Counts *de tenentibus minat. Ra. Entr.* 662. *vid. ſupra, Titulo* Servants.

By Leſſee. Eſtranger cuts down the Trees, or doth other Waſte; Leſſee ſhall have Action of Treſpaſs, and recover treble Damages. But if Leſſor die before his Action of Waſte ſued, ſingle Damages. *Rolls* 2 *Abr.* 551. 5, 6. *Doct.* and *Stud.* 34. a.

Tenant for Years is ouſted, and the Years expire; he ſhall have Treſpaſs before Entry, and recover the mean Profits. 38 *H.* 6. 28. b. 13 *Rep. Co. p.* 69. *Vide ſupra.*

Leſſee ſhall have Treſpaſs *quare Clauſum fregit*, for the Entry of the Leſſor, and for cutting Trees, for the ſpecial Loſs. 19 *H.* 6. 45. *Pl.* 94. 12 *E.* 4. 8. *Pl.* 20. 3. 6 *H.* 5. 5. *Dier p.* 90.

If Leſſor eject Leſſee for Years, an Action of Treſpaſs lies againſt him by the Leſſee. *Sur. de Ley*, 346. *Vid. pluis apres.*

A Man Letts Land except the Trees, and grants Liberty to the Leſſee to lop them, and after the Leſſor cuts them down: the Leſſee ſhall have an Action on the Caſe, and not Treſpaſs. *Pal.* 211, 212.

By Tenant at Will and Sufferance.

Tenant at Will ſhall have Action of Treſpaſs againſt a Stranger. *Co.* 13. *Rep.* 69.

Tenant at Sufferance ſhall have an Action of Treſpaſs in reſpect of his Poſſeſſion. 2 *Rolls Abr.* 551. *N.* 1, 2, 3. *Vid. ſupra.*

By him which hath Profit *apprender.*

He that is a Grantee *proficui* of ſuch a Meadow *poſt falcation. inde* (*videlt.*) that is, ſuch Graſs that is after mowing till Lady-day after, ſhall not have Treſpaſs *quare Clauſum fregit*; but for ſpoiling the Graſs he may. 3 *Leon.* 213. *Hitchcock's* Caſe.

Treſpaſs doth not lie for him who had Profit *apprender* out of the Land of another; but Action of the Caſe lies againſt him that hath the Frank-Tenement in Poſſeſſion, as in the Caſe of *Herbage, Pawnage*, &c. 2 *Anderſon* p. 7.

Grantee of Herbage ſhall not have Treſpaſs *quare Clauſum fregit*, (*quære de hoc, vide poſt.*) but for ſpoiling the Graſs he ſhall have Treſpaſs. But *per Co.* on *Lit. fo.* 4. b. the Grantor of *Herbagium terræ* hath a particular Right in the Land, and he ſhall have Action *quare Clauſum fregit.* So ſhall the Grantee of the Ear-graſs. 2 *Leon. p.* 213. *Harvy* and *Hitchcock, Dier* 285.

The King's Patentee *de Herbagio Foreſtæ*, ſhall have Treſpaſs for Graſs, and ſhall ſay, *quare Clauſum fregit.*

A. Lett's Land to *B.* to ſow, and *A.* is to have the Moiety of the Corn; *B.* ſhall not have Action of Treſpaſs againg *A.* for waſting the Corn. 329 *Hill.* 30 *Eliz. Hare* verſus *Oakley.*

A.

A. ſeized in Fee of a Cloſe, grants the Paſture of the Cloſe to *B.* for Years; *B.* ſhall have Treſpaſs *quare Clauſum fregit. Rolls* 2 *Abr.* 549 *H.* 2.

He which had but one Crop and the firſt Veſture of a Meadow, or ſecond Crop every third or ſecond Year, ſhall have Treſpaſs *vi & armis quare Clauſum fregit.* So he which had *Herbagium Parci. More No.* 453.

By Copy holder

Copy-holder paying his Cuſtoms and Services, if he be ejected by his Lord, he ſhall have Action of Treſpaſs againſt him. *Co. Lit.* 60. b. q. 61. a. t. 4 *Rep.* 22. a. for though he is *Tenens ad voluntatem Domini,* yet it is *ſecundum conſuetudinem Manerij.*

Copy-holder ſhall have Treſpaſs againſt his Lord for cutting Trees or breaking his Houſe. *Co.* 13 *Rep.* 69. 1 *Leon.* 272. 2 *H.* 4. 4. 12. 4 *Rep.* 21. *More, Stebbing* and *Goſwell.*

Copy-holder ſhall have Treſpaſs for breaking his Cloſe and cutting his Trees. *No. Liber Intr.* 644. *c.* 4. *Rep.* 31. a.

Copyholder ſhall have Treſpaſs for entring his Cloſe and burning his Hay. 35 *H.* 6. 5. *Pl.* 7.

Copy-holder ſhall have Treſpaſs, and this before his Admiſſion by Deſcent. 2 *H.* 4. 12. *Pl.* 49. 4 *Rep.* 23. b. and though he ſurrender, yet before Admittance he that maketh the Surrender continues in Poſſeſſion, and not the Lord, or *ceſtuy que uſe,* and he ſhall have Treſpaſs againſt any that enters. *Cro. Eliz. p.* 349. *Berry* and *Green.*

A Copy-holder of Underwood without the Soil ſhall have Treſpaſs *quare Clauſum fregit. More N.* 480.

Tenants

By Tenants in Common.

Tenants in Common ought to join in Treſpaſs againſt one who pulls down their Houſes, breaks their Cloſe, &c. and if one die, the Action ſhall ſurvive. *Lit. ſect.* 315. *Cro. Jac.* 231. *Some's* Caſe.

Where Damages are to be recovered for a Wrong done to Tenants in Common in a perſonal Action, and one of them die, the Survivor of them ſhall have the Action; for albeit the Property be ſeveral between them, yet the perſonal Action is joint. *Co. Lit.* 198. *Vid. Lach. p.* 152. *Harman* and *Whichlowe.*

One Tenant in Common brings Treſpaſs for entring into the Land, the Defendant pleads Not Guilty. The Jury found him Guilty, and Judgment for the Plaintiff. It had been a good Plea in Abatement to ſay, That the Plaintiff was Tenant in Common with a Stranger; yet he having not pleaded it, he hath loſt the Advantage thereof; and the Jury finding that he was Tenant in Common is not material. *Cro. Eliz. p.* 554. *Deering's* Caſe.

Tenant in Common ſhall not join in Treſpaſs for a Battery. *Reg. Orig.* 105. b.

Tenants in Common for taking away of Cygnets ſhall join. 7 *Rep.* 17. a.

One Tenant in Common ſhall not have Treſpaſs *de bonis aſportatis* againſt his Companion. *Lib. Intr.* 653. B. Nor of his taking the Profits of the Land. Nor for a ſeveral Fiſhing, 1 *Keb.* 18.

If two Tenants in Common be of a Dove-houſe, and the one deſtroys the old Doves, whereby the Flight is wholly loſt, the other Tenant in Common ſhall have an Action of Treſpaſs, *quare vi & armis columbare del Plaintiff fregit & ducent. columbas pretii* 20 *s. interfecit per quod volatum columbaris ſui totaliter amiſit:* for the whole Flight

Flight is deſtroyed, and therefore he cannot in Bar plead Tenancy in Common.

So if two Tenants in Common be of a Park, and one deſtroys all the Deer, Treſpaſs lies.

So if one Tenant in Common take and carry away the Mere-Stones.

If two Tenants in Common be of a Folding, and the one of them diſturb the other, he ſhall have Treſpaſs *quare vi & armis*.

Two Tenants in Common of an Houſe, and one of them nailed up the Doors, and made up a Wall againſt the Houſe to prevent the other's getting into the Houſe, this was reſolved no Diſſeiſin, *Allen p.* 8. *Water's* Caſe.

Jointenants.

If two join in Treſpaſs for taking of Goods whereof they were jointly poſſeſſed, one in an Action may not declare of the taking of the Goods from him only; and if one dies, *pendent l' Action*, all ſhall abate; *Hetly p.* 2. *Thomas's* Caſe. *Hutton.* though the Treſpaſs ſhall be puniſhed by the Survivor. *Crok. Jac. p.* 19. Sir *Oliver Leigh's* Caſe.

In Treſpaſs the Defendant pleads Not Guilty. Jury find the Plaintiff was ſeized of the Land with others as Jointenants. Judgment for the Plaintiff. Yet it had been a good Plea in Abatement had the Defendant pleaded it. *Cro. Eliz. p.* 554. *Deering* and *Moor.*

Lunatick.

Committe of a Lunatick ſhall not have an Action of Treſpaſs, but the Lunatick himſelf. *Hutton* 16. *Drury* and *Fitch.*

Diſſeiſee.

Diſſeiſee ſhall have Treſpaſs for the mean Profits after Re-Entry; if a Diſſeiſor cuts Graſs, Trees, Emblements, and Diſſeiſee re-enter, he ſhall have Treſpaſs *vi & armis* againſt the Diſſeiſor, but not againſt

againſt Feoffee, *&c.* of the Diſſeiſor; but Diſſeiſee ſhall recover all the Damages againſt the Diſſeiſor himſelf. *Dier* 134. *Pl.* 19. 11 *Rep. fo.* 51. a. b. *Liford*'s Caſe. *Hetly* 66. *Symond*'s Caſe. *Hobart p.* 98. in *Moor*'s Caſe. *Lit. ſect.* 430. So I ſhall not have an Action againſt the ſecond Diſſeiſor. *Mes* 2 *Rolls Abr.* 554. T. 5, 6, 7, 8. *contra.*

Upon any Continuance in Poſſeſſion after continual claim by the Diſſeiſor, Diſſeiſee ſhall have Treſpaſs *quare Clauſum fregit. Lit. ſect.* 430. *Co. L.* 257. *Vid. plus ſupra.*

Gaoler. Galor ſhall have Action of Treſpaſs againſt one who takes a Priſoner from him. It's a good Plea that he is not a Goaler. 4 *Ed.* 4. 6. *Pl.* 7. *fo.* 44. *Pl. ult.*

Maſter of an Hoſpital. Maſter of an Hoſpital ſhall have Treſpaſs for a thing done in the time of his Predeceſſor. *N. B.* 89. b. *Reg. Or.* 196. B.

Attorney. Treſpaſs by an Attorney by Attachment of Privilege. *Ra. Entr.* 610, 619. *Co. Entr.* 644. *Winch. Entr.* 1100.

Treſpaſs *verſus Attorney per Bill. Ra. Entr.* 610.

Baylee. Baylee, or he which had a ſpecial Property ſhall have a general Action of Treſpaſs againſt a Stranger, and recover all in Damages, for that he is chargeable over. *Co.* 13 *Rep.* 69. 14. *H.* 4. 28. b. 21. *H.* 7. 14. b.

If Baylee of Goods bring Treſpaſs, and the Baylor brings another Action of Treſpaſs, he which firſt recovers ſhall ouſt the other of his Action. 5 *H.* 4. 2. and it ſhall be a good Bar to the other.

He

He which hath a ſpecial Property in the Goods for a time certain, ſhall have a general Action of Treſpaſs againſt him who had the general Property, and upon Evidence Damages ſhall be mitigated. 11 *H.* 4. 23.

He which had Cattle for a Year to compoſt his Lands, may have a general Action of Treſpaſs againſt a Stranger if he take them within the Year, and againſt the Leſſor himſelf, and againſt his Alienee. 2 *Rolls Abr.* 551. 2, 3, 4. and 569. 7.

The Agiſter of Goods may have Treſpaſs for the taking of them. 48 *E.* 3. 20. b. Agiſter.

Grantee or Patentee of the King *de Herbagio Foreſtæ* ſhall have Treſpaſs againſt any who conſumes or deſtroys the Graſs, but not the Trees. *Dier* 285. *Pl.* 40. *Vide ſupra in Profit apprender.*

Where Damages for Goods are recovered againſt *J. S.* *J. S.* ſhall have Treſpaſs for the Goods. 1 *Keb.* 43.

Treſpaſs for the Battery of the Son doth not lie for the Father, although the Son loſe his Marriage by this; but the Son only ſhall have the Action. *Cro. Eliz. p.* 55. *Gray* and *Jeffreys.* But the Father ſhall have an Action for taking his Son and Heir, or Daughter and Heir, for that the Marriage appertains unto him. But for the Aſſaulting and impriſoning his Daughter no Action lies by the Father. *Cro. Eliz. fo.* 769, 770. *Barham* and *Dennis.* Father.

Treſpaſs *quare vi & armis in Annam Filiam ſuam & ipſam cepit & impriſonavit,* the Father ſhall not have the Action: none ſhall have Remedy for the Impriſonment but the Party to whom it was done: and alſo the Writ doth not ſay *cepit & abduxit.* ibid.

Intruder

By Intruder. Intruder on the King's Poſſeſſion ſhall have Treſpaſs againſt a Stranger, but not Ejectment. *Allen p.* 10. *Johnſon* and *Barret*. *Q. de hoc*, for then he might be twice puniſhed. *Vide ſupra contra.*

By Outlaw'd Perſon. A Man is Outlawed and pardoned, he ſhall have Treſpaſs for Treſpaſs done to his Perſon before Pardon.

By King. If a Man be Outlawed in an Action perſonal, and the King hath the Profits of the Land, and Letts the ſame to another, he ſhall have an Action *quare clauſum fregit*. 3 *Leon. p.* 213.

By Commoner. If the Lord leave not ſufficient Common, the Tenant ſhall have Remedy by Aſſize, Treſpaſs or Proſternation. *Cok. Mag. Ch. p.* 88. *ſur Stat. Merton. c.* 4. He may have Action of Treſpaſs againſt the Lord for digging Pits in the Common. *Siderf.* 106. *Goe* and *Cother*.

If a Commoner fill a Trench in the Common which was digged by the Lord, the Lord may have Treſpaſs againſt him. *Siderf. p.* 251. *Howard* and *Spencer*.

A Commoner ſhall not have Action of Treſpaſs *quare Clauſum fregit*. 12 *H.* 8. 2. *Simon de Harcourt's* Caſe, 4 *H.* 7. 3. 15 *H.* 7. 13.

A Commoner may not have an Action of Treſpaſs for the Beaſts of a Stranger doing Damage. *Rolls* 1 *Abr.* 405. A. 5. *Bridgman p.* 10.

A Man had Common in the Soil of another, and an Eſtranger puts in his Cattle, the Commoner ſhall not have an Action of Treſpaſs; but he may diſtrain Damage Feaſant. Neither ſhall he have an Action of Treſpaſs *quare Clauſum fregit*. *Bridgman p.* 10, *Bulſtr.* 2. 88. A Commoner ſhall

ſhall not have an Action of Treſpaſs of Graſs ſpoiled. 22 *Aſſize.* 48. 2 *Rolls Abr.* 552. 9.

Cro. Jac. p. 208. *Kennick* and *Pargiter.* The Lord is ſtinted to put in three Horſes upon the Common, and becauſe he put in more, the Commoner juſtifies for Damage Feſant in Treſpaſs, and good.

The Sheriff takes Goods by *Fieri Facias*, and before Vendition the Defendant takes them, the Sheriff ſhall recover in Treſpaſs. *Cro. Eliz.* 639. *Tyrrell's* Caſe. *Mod. Rep. p.* 30. *Wilbraham* and *Snowe.* The Sheriff had ſuch a Property in the Goods by the Seizure, that he may well maintain a Treſpaſs or Trover. 2 *Sanders* 47. *meſme* Caſe. By Sheriff.

An Action of Treſpaſs *port per* Corporation *edibus ambulando* in *B. R. Winch. Entr. p.* 1100. By Corporation.

When an Eſtray comes within a Manor and walks there, this is a Treſpaſs, and the Party in whoſe Land the Eſtray is Damage Feſant, may chaſe him out of the Ground: if an Eſtray be *ferox* he may be fettered. *Hetly p.* 67. *Pleydell* and *Poſmore.* By Lord *feroz* Eſtray.

When the Lord ſeizeth the Eſtray, then he hath Commencement of a Property thereby, and he is chargeable againſt all others for the Treſpaſs the Eſtray doth; and if the Eſtray within the Year ſtray out of the Manor, the Lord may chaſe back the Eſtray; but if it be ſeized by another Lord, then the firſt hath loſt all Poſſibility of gaining the Property, and the other Lord ought to proclaim it *de novo.* *Hetly p.* 61. *Pleydell* and *Poſmore.*

By Guardian. *Plowd. Com. p.* 293. *Osborn's* Caſe.

The Plaintiff Infant may ſue by Guardian or *Prochein Amy*; but the Defendant ſhall ſue only by Guardian. *Cro. Car.* 161. Goodwin's Caſe.

Ceſtuy que Uſe. *Ceſtuy que Uſe* at this Day is immediately and actually ſeized and in Poſſeſſion of the Land, ſo as he may have an Aſſize or Treſpaſs before Entry againſt any Stranger who enters without Title. *Cro. Eliz. p.* 46.

By Tenant by *Elegit.* If a Stranger holds out the Tenant by *Elegit*, the Tenant by *Elegit* ſhall not hold over againſt the Reverſioner, but is put to his Action of Treſpaſs againſt the Stranger. 2 *Sanders* 72. 4 *Rep.* 82. b. Sir *Andrew Corbet's* Caſe.

Caſe by him in Reverſion, and Treſpaſs by the Tenant in Poſſeſſion for the ſame Treſpaſs. Caſe, and declares, That he was ſeized in Fee of a Cloſe, and the Defendant was poſſeſt of another Cloſe next adjoining, between which Cloſes ran a Rivulet, and that the Defendant had ſtopt this Rivulet, by which it ſurrounded and drowned the Cloſe of the Plaintiff; by which *Arbores Maremial' (viz.) &c. putridæ & conſumptæ devener'*. The Defendant pleads, That one *S. de ante prædict. tempus quo, &c. & eodem tempore quo, &c.* was poſſeſt of the ſaid Cloſe by Virtue of a Leaſe made by the Plaintiff's Father, and that he had payed to *S.* 20 *l.* which he had accepted in Satisfaction of the ſaid Treſpaſs. The Plaintiff demurs. *Per Cur.* it's no Plea: For the Plaintiff in reſpect of the Prejudice, may maintain one Action, and *S.* in reſpect of the Poſſeſſion and of the Shade, Shelter and Fruit of the Trees another for the ſame Tranſgreſſion; and the Satisfaction given to the one is no bar to the other. But Treſpaſs during the Term the Plaintiff might

not have had, being founded only upon the Poſſeſſion, 3 *Levinz.* 209. *Bidlesfred* and *Onſlow.*

Treſpaſs *vi & armis*, Plaintiff declares that the Defendant ſuch a Day and Year did thruſt a Woman named *Margaret Hunt*, againſt his Son *Henry Hunt*, being an Infant under fourteen Years of Age, by means whereof his Thigh Bone was broken; and the Plaintiff expended divers Sums of Money to cure him. 5 *l.* Damages. *Quær.* If the Action lies for the Father, becauſe it is not laid, *per quod Servitium amiſit*, nor that the Son was leſs capable of procuring a Fortune with a Wife, *&c.* but the Child himſelf ought to have brought the Action. So in *Grey* and *Jeffries* Caſe. 2 *Cro.* 55. Treſpaſs for Battery of the Son lies not for the Father, and *Stiles* 398. but Judgment was given for the Plaintiff in the principal Caſe, in *Rippon* and *Norton's* Caſe. *Cro.* 63. 849. and 841. *Raym.* 259. *Hunt* and *Wootton. Vide* to this purpoſe in an Action on the Caſe. *Ray.* 302. *Ra. Dutton* and *Grizil's* Caſe againſt *Nevill Pool.*

Againſt what Perſons Treſpaſs Vi & Armis *lies, or not.*

Againſt Baron and Feme, Vide ſupra.

Againſt the Sheriff or other Officers.

When a Court hath Juriſdiction of the Cauſe, and proceeds erroneouſly, there the Party who ſues, or the Officer of the Court who executes the Precept or Proceſs of the Court, no Action of Treſpaſs lies againſt them. But when the Court had no Juriſdiction of the Cauſe, Actions ſhall be againſt them without any regard of the Precept or Proceſs. 10 *Rep.* 76. the Caſe of the *Marſhalſea.*

So if the Sheriff extend ancient Demeſne Land as well as other, he had a Warrant and is not to diſpute what is liable and what not, and is not ſubject to an Action of Treſpaſs. *Hobart p.* 48. *Cox* and *Barmſly*, 6 *Rep.* 54. the Earl of *Rutland*'s Caſe.

On *Fieri Facias* againſt *J. S.* who hath Goods of *A.* on Sale of theſe Goods Trover or Treſpaſs will lie againſt the Sheriff; and to prevent this, all the Sheriffs of *England* take Security. 1 *Keb.* 693. *Sanders* and *Powell.*

The Sheriff takes one not named in the Writ, Treſpaſs lies againſt him; and if the Plaintiff ſhew another Perſon to him, Action lies againſt both.

A. procures the Sheriff to arreſt *B.* without Writ, and after purchaſeth a Writ, and the Sheriff arreſt the Perſon being in his Cuſtody, Action of Treſpaſs lies. *Dier* 244. *Pl.* 61.

The Sheriff takes *B.* upon a *Capias*, and doth not return the Writ, *B.* ſhall have Treſpaſs. 20 *H.* 6. 24. a. 21 *H.* 6. 5. *aliter* upon a *Ca. Sa.* or *Habere fac. poſſeſſion.* 4 *Rep.* 67. a.

If a Sheriff make a good Return in Law, but *faux en fait*, upon an *Habeas Corpus*, this Action lies, 9 *Rep.* 99. b. *Bagg*'s Caſe.

Capias is directed to the Sheriff of *Middleſex*, and he takes him in *London*, an Action of Treſpaſs lies. 16 *Ed.* 4. 6.

If a Sheriff by Replevin deliver other Goods than were diſtrained, Treſpaſs lies againſt him. *Doct.* and *Stud.* 150. *Rolls* 2 *Abr.* 552. 6. 14 *H.* 4. 14. *Pl.* 32.

If the Sheriff comes to make Replevin, and breaks the Hedges and Gates, he is a Treſpaſſor, unleſs the Owner hinder him to make the Replevin. 20 *H.* 6. 28. *Pl.* 19. 2 *Rolls Abr.* 552. 8.

In

In Replevin if the Plaintiff ſhew the Goods of a Stranger for his own Goods, and the Sheriff take them, Treſpaſs lies againſt the Plaintiff. 2 *Rolls Abr.* 553. 5.

If another Man's Goods are pledged to me, and the Sheriff take them, I ſhall have this Action againſt him. *Bro. Treſpaſs*, 364.

And if the Sheriff take one Man for another, Treſpaſs for *Faux Impriſonment* lies againſt him.

If the Sheriff break the Houſe for Debt or Treſpaſs, this Action lies. 5 *Rep. Semaine's* Caſe.

If the Sheriff exceed his Authority in the Execution, this Action lies; as breaking Doors, *&c.* 5 *Rep.* 93. 196. 1 *Brownl.* 117. 1 *Bulſtr.* 64.

If a Bailiff of a Court upon a Summons to him directed attach the Party by the Goods of another Man, an Action of Treſpaſs lies againſt him. So if the Sheriff upon Execution take the Goods of a Stranger; but if he attach the Defendant by the Goods of another Man being in his Poſſeſſion, this is juſtifiable. 11 *H.* 4. 91.

Treſpaſs lies if he attach the Servant by the Goods of the Maſter, being in Poſſeſſion of the Servant, and for the Debt of the Servant. 2 *Rolls Abr.* 552. *o.* 2 *Doct.* and *Stud.* 149. b. 138. b.

If a Man hath an Hundred, and *bona & catalla felonum* within the Hundred, and the Sheriff takes the Goods of a Felon within the Hundred, an Action of Treſpaſs lies againſt him. *N. B.* 91. F.

If the Sheriff make a Warrant to a Bailiff of a Franchiſe to take the Goods of a Man in Execution, and he miſtakes the Goods, and takes the Goods of another Man, the Bailiffs are Treſpaſſors, and not the Sheriff. 2 *Rolls Abr.* 552. 9.

If a Man be arreſted by the Bailiffs of a Sheriff, and upon this he ſhews to them a *Superſedeas* to diſcharge him, the Bailiffs refuſe and detain him, he ſhall have *Faux Impriſonment* againſt the Bailiffs, and not againſt the Sheriff. *Vide infra Tit. Faux Impriſonment.*

A Man is arreſted and tenders ſufficient Bail, and it is refuſed, and ſo he is impriſoned; this doth not make the Arreſt and Impriſonment ſo tortious as to have an Action of Treſpaſs, but he might have an Action on the Caſe. *Cro. Car. p.* 196. *Salmon* verſus *Percivall.*

After a Rule of Court to vacate a Judgment, Treſpaſs lies againſt him that taketh the Goods in Execution. 1 *Keb.* 453. cited in *Felgate's* Caſe.

If a Keeper detain his Priſoner for undue Fees, after he is diſcharged by Law, an Action lies. *Bro. Faux Impr.* 12 *Kel.* 36. 89.

If a Serjeant in *London*, or Bailiff in the *Country* takes a Man upon *Capias* in Proceſs at my Suit, and *J. S.* reſcue him out of his Poſſeſſion, I may have a general Writ of Treſpaſs againſt him, or an Action on the Caſe at my Election. 2 *Rolls Abr.* 556.

Vide plura de hoc poſt Titulo Faux Impriſonment.

Act. ſur Stat. Marlbridge, c. 15. *W.* 1. 16. lies, if the Lord diſtrain *in Via Regia*, or *Communi Strata*; and it ſhall be *contra pacem*, not *vi & armis.* 2 *Inſt.* 131. *Artic. Cler. c.* 9. 8 *Rep.* 60. b.

Againſt Seignior.

For a tortious Diſtreſs where nothing is arrear, Tenant ſhall not have an Action againſt the Lord, of Treſpaſs *vi & armis*, for this is prohibited by the Statute of *Marlebridge, c.* 3. *non ideo puniatur Dominus*; but if Bailiff or Servant of the Lord take a Diſtreſs where nothing is behind, here Action

Action of Treſpaſs *vi & armis* lies againſt him; for the Bailiff is not *Dominus*, and therefore it is intended where the Lord himſelf doth diſtrain. 4 *Rep.* 11. b. *Bevill's* Caſe, *Yelv. p.* 148. *contra.* 9 *Rep.* 76. a. *Co.* 2 *Inſt.* 105, 106.

Tenant brought an Action of Treſpaſs againſt the Lord, and Iſſue is found *pro Quer.* Yet if it appear by the Verdict that the Plaintiff was Tenant and the Lord Defendant, the Writ ſhall abate by the Stat. 10 *Ed.* 4. 7. *Savil's Rep.*

If the Leſſor put out the Leſſee for Years, or diſſeiſe his Tenant for Life, or do any Act not as *Dominus*, as cut any Wood, or break the Houſe, or feed the Ground of his Tenant, or the like, which he doth not in reſpect of his Seigniory, there an Action of Treſpaſs *quare vi & armis* lieth againſt him. *Co. Magna Charta, p.* 105. 9 *Rep.* 76. *Combe's* Caſe, *Dier* 90. b.

Seiſin by Incroachment ſhall be avoided in Treſpaſs. 4 *Rep.* 11. b. *Bevill's* Caſe.

If the Lord diſtrain out of his Fee Treſpaſs lies. 2 *Inſt.* 131.

When the Lord abuſeth his Authority given to him by the Law, he ſhall be puniſhed by Treſpaſs; as if he labour or kill a Diſtreſs. So againſt him that abuſeth a Damage Feſant, or he that enters to view the Repairs, breaks the Houſe. 8 *Rep.* 146. the ſix Carpenters Caſe.

Leſſee cuts down Trees to repair, and the Leſſor. Leſſor takes them away, Treſpaſs lies againſt him. 44 *Ed.* 3. 44.

This Action lies againſt the Lord who ejects and ouſts the Copy-holder, 4 *Rep.* 22. a. without lawful Cauſe. *Co. Lit.* 60. b.

It lies againſt the Lord of the Soil for digging Pits in the Common. *Siderf.* 106. *Goe* and *Cother.* The Defendant pleads he is Lord of the Soil, and

dug for Coals, making ſo little Damage to the Paſture as he could, and avers he had left ſufficient Common. *Per Cur.* this amounts to the general Iſſue. *Vide* 1 *Keb.* 936.

Againſt one that is forced to a Treſpaſs.

If a Man drive my Cattle into the Land of another, he is a Treſpaſſor and not I, and the Action ſhall be brought againſt him: and ſo it is if a Man by force carry me into the Land of another. *Stiles p.* 65. *Stone*'s Caſe, and it may be pleaded in ſpecial Juſtification.

Againſt Tenant at Will.

It lies againſt Tenant at Will who doth voluntary Waſte. 5 *Rep.* 13. *Co. Lit.* 57. a. 2 *Rolls Abr.* 555. y. o. and for cutting Underwoods. 2 *Ed.* 4. 24. *Pl.* 25.

It lies againſt Grantee of Tenant at Will. *Vide prius.*

Againſt Tenant at Sufferance. *Vide prius.*

It lies by the Leſſor againſt Tenant at Will for cutting the Trees down; for though he had Poſſeſſion of the Land by lawful means, yet he had no Intereſt in the Trees for that purpoſe. *Savil Rep.* 84. *Walgrave* and *Somerſet.*

Againſt Baylee.

Baylee of Goods, as of an Horſe, *&c.* and kills them, the Baylee ſhall have a general Action of Treſpaſs or Trover at election; *aliter* if there be Confidence repoſed in the Perſon, and there is Negligence, an Action of the Caſe then lies. *Vide prius.* 5 *Rep.* 13. a. Earl of *Salop*'s Caſe, *Co. Lit.* 57. a.

When the Privity of Baylment is determined by the Tortious Act of the Baylee, a ſpecial Action of the Caſe lies, but not Treſpaſs. One delivers an Horſe to ride to *A.* and he rides further to *B.* no *Treſpaſs* lies. 1 *Rolls Rep.* 128.

Tre

Treſpaſs *vi & armis* lies againſt a Servant for taking away his Maſter's Goods. 1 *Leon. p.* 87, 88. *Gloſſe* and *Heyman. vide ſupra.* Againſt a Servant.

In all caſes where the Servant hath not a general nor ſpecial Property, Treſpaſs lies againſt him. *More, Hill.* 29 *Eliz.*

If my Servant without my notice puts my Beaſts into another Man's Land, my Servant is the Treſpaſſor, and not I. *Aliter* if my Wife put them in. 2 *Rolls Abr.* 553.

Defendant is found a ſufficient Treſpaſſor, although he is but a Servant to the Pretended Owner of the Land, and he which is true Owner may bring this Action againſt Maſter or Servant: the Maſter may withdraw himſelf. *Yelv.* 144. *Wilſon* and *Weddell.* Againſt a Diſſeiſor.

Treſpaſs doth not lie againſt an Executor; for *Actio perſonalis moritur cum perſona.* Doct. and Stud. p. 75. *i. e.* for a Tort done by the Teſtator. Againſt an Executor.

Treſpaſs lies againſt an Alien. *Dig. Br.* 72. a. Againſt an Alien.

It lies againſt a Perſon attainted. *Mich.* 38, 39 *Eliz. C. B. Baniſter* and *Truſſell.* Againſt a Perſon attainted.

It lies againſt a Maſter of an Hoſpital and his Brethren. *No. Lib. Intr.* 248. a. Againſt a Maſter of an Hoſpital.

It lies againſt a Dean and Chapter. 32 *H.* 6. 8. *Pl.* 13. Dean and Chap.

It lies againſt Mayor and Commonalty. *Quære* if *vi & armis:* but *Capias* lies not againſt them. Mayor and Commonalty.

It

Ideot. It lies againſt an Ideot.

Lunatick. It lies againſt a Lunatick. *Hob. p.* 134. *Dig. Br.* 72. *A.*

Infant. It lies againſt an Infant. *Dig. Br.* 72. If he appear by his Attorney and not by Guardian, it's Error. 2 *Cro.* 10. *Bray*'s Caſe.

Treſpaſs againſt three, and one of the Defendants was an Infant at the time of the Plea by Attorney pleaded: *per Cur.* it's Error; but if he had been one of the Plaintiffs, and a Verdict paſt, it's no Error, but ſaved *per Stat.* 21 *Jac.* Judgment totally reverſed. 1 *Keb.* 940. *Topham.*

Parſon. It lies againſt a Parſon for not taking away his Tithes in due time. *Stiles* 372. *Liniſton*'s Caſe. The Defendant pleads, the Plaintiff gave him no Notice to fetch away his Tithes.

Attorney. Againſt an Attorney *per Billam. Ra. Entr.* 610.

Againſt one that commands Treſpaſs lies againſt him who commands another to do a Treſpaſs. *Dr.* and *Stud.* 19. a. *vide Vaughan Rep.* 116. of Aſſiſtors in Treſpaſs when the Actors are acquitted.

Againſt an Intereſtee. If my Beaſts are in the Yard of *J. S.* and during this time they do a Treſpaſs to another; he ſhall have Treſpaſs againſt me or *J. S.* at his Election. 2 *Rolls Abr.* 546. B. 1.

Againſt a Commoner for filling up Trenches made by the Lord. A Commoner cannot dig a Trench to meliorate the Ground. 1 *Keb.* 884, 936. *Howard* and *Spencer.*

If

If a Man who claims Common *appurtenant* puts in any Beaſts which are not *Levant* and *Couchant*, he doth wrong to the Lord, and ſhall be puniſhed as a Treſpaſſor, 2 *Sanders* 327.

Againſt a Commiſſioner of Bankrupt, *per Cur.* If the Plaintiff declares of the Entry into his Houſe, the Defendant may not plead not guilty, and give the Special Matter in Evidence, but he ought to plead the Commiſſion of Bankrupts and all the Special Matter. But if it had been for taking of Goods only, he may plead *non culp.* general. *Quær.* the Difference. *Lit. Rep.* 356. Againſt a Commiſſioner of Bankrupt.

Treſpaſs of Battery and *Faux Impriſonment* againſt a Maſter of Chancery, by Bill in Chancery and Pleading and Iſſue; and after *Mittimus* out of the Chancery, theſe Iſſues were delivered here to be tried, *i. e.* in *B. R. Cro. Car.* 161. *Goodwin* verſus Sir *Rich. Moor.* Againſt a Maſter in Chancery.

I deliver my Goods to another to keep, *&c.* and he gives or ſells them to a Stranger, I cannot have Action againſt the Stranger. Againſt a Stranger.

Lit. Sect. 70. If a Stranger buy my Goods of one that hath ſtollen them from me, in a Market, and knowing them to be ſtollen, this Action lies againſt either. *Doct.* and *Stud.* 149. a

CAP.

CAP. VIII.

Of the ſeveral Sorts of Treſpaſſes, or for what Matter Treſpaſs lies; with Notes on the Counts, and Pleadings thereon.

Treſpaſſes are Torts *touching the* { Body, Chattels, Inheritance.

TORTS to the Body are Aſſault, Battery, Wounding, *Faux Impriſonment.*

Aſſault and Battery.

What amounts to an Aſſault.

If a Man hold me by the Arm, it is an Aſſault in Law.

So if one ſaith he will cut my Arm. *Quære de hoc.*

If one ſaith, If I will not ceaſe my Suit he will beat me.

Challenge is an Aault.

Menace, ſo that a Man dare not tarry in Town.

If a Man ſtrike at me with a Hatchet (although he do not touch me) it is an Aſſault.

If a Man deliver to another a *Subpœna.* 2 *Rolls Abr.* 545. *Quære.* For

In 2 *Bulſtr.* 327. *per Dodderidge,* Words do not make an Aſſault.

The Intention as well as the Act makes an Aſſault, therefore if one ſtrike another upon the Hand,

Hand, Arm or Breast, in Discourse, it's no Assault, because there was no Intention.

Holding up the Hand against another is Assault. *Mod. Rep. p.* 3.

What shall be said to be a Battery.

Molliter Manus imposuit upon his Shoulder, and saith to *J. D.* that he hath a Warrant to arrest him from a Justice of Peace, this is not a Battery. 2 *Rolls Abr.* 546.

So if a Man deliver a *Subpœna* to another, this is not any Battery. *ibid.*

Counts upon Assault, Battery, Wounding, &c. *and Imprisonment.*

In Assault and Battery the Case upon Evidence was this: The Defendant drew a Sword, and waved it in a Menacing manner against the Plaintiff, but did not touch him; so the Jury were to find him guilty as to the Assault, but not of the Battery: and the Opinion of the Court was, that the Plaintiff was to have no more Costs than Damages. For the New Act excepts Actions of Assault and Battery; so that both must be proved. 1 *Ventr.* 256.

Assault and Battery against two Defendants, and declared of Assault, Battery, *& tantas minas de Vita sua imposuer', &c.* they pleaded *son Assault demesne.* The Court held this no Error, which is not Law; though nothing be said to the *minas* yet it's good; for the *minas* is but to enforce the Damage. *More, Penruddock's* Case.

Declaration was *pro eo quod cum le Def. luy assault. Per Cur.* it's not good, it's not direct Averment. 1 *Rolls Rep. p.* 55. *Sherland* and *Haughten.*

Because

Recruſe no Place was where the Battery was made, Judgment was arreſted. *Lacth* 273. *Edſoll's* Caſe.

In Treſpaſs for Battery and *Faux Impriſonment*, the Plaintiff declares, *quod cum, &c.* The Defendant juſtifies by Proceſs out of the Court of *Pie-Powders* in *New-Caſtle* on *Tyne*. Demur: but the Court, without regard to the Plea, though it was a Confeſſion of the Matter in the Declaration, gave Judgment, *quod. Quer' nil cap. per Billam*; for by the [*cum*] the Declaration was defective in Subſtance, nothing being preciſely affirmed. Sir *T. Jones* 197. *Chomly* and *Moreton*.

Baron and Feme.

In Treſpaſs by Baron and Feme of the Battery of the Wife, and taking the Goods of the Huſband. On Not Guilty pleaded, Verdict was found for the Plaintiff for the Battery, and for the Defendant for the reſidue: and it was moved in arreſt of Judgment, that the Action was not well brought as to the Goods, and the Severance by the Verdict had not cured it. *Hob. Reynel* and *Grey*, 12 Cr. *Buckly* and *Hales*, and the Judgment was ſtayed. 1 *Levinz. p.* 3. *Talbot* and *Bacon*.

Treſpaſs for Battery of the Wife, and taking from her an Apron and a Pinner. After Verdict *pro Quer.* moved in arreſt of Judgment: 1. It is not ſaid in whom the Property of the Apron and Pinner were; of the Wife it cannot be ſaid, they may be of a Stranger, and then neither Husband nor Wife had Cauſe of Action. For then, 2. If they were the Goods of the Husband, the Wife ought not to join with him; and Judgment was ſtayed. 2 *Levinz.* 20. *Dunwell & Ux'* verſus *Marſhall*.

In

In Treſpaſs by Baron and Feme for beating of them both. Upon Not Guilty, the Verdict was ſo much Damage for beating the Husband, and ſo much for beating of the Wife. The Court ſaid, That upon a Motion to arreſt the Judgment, that the Plaintiff might releaſe the Damages for the beating of himſelf, and take Judgment for the other. 1 *Ventr.* 328.

Bars to Treſpaſs of Aſſault, Battery, Wounding, Impriſonment, &c.

Three Degrees to avoid the Charge of Treſpaſs:

Inficiatio, Denyal,
Juſtificatio,
Excuſatio.

To Treſpaſs, the common Bar to Battery, Not Guilty. 3 *Br.* 400.

Or ſpecially to the Treſpaſs, *ſon aſſault demeſne*. 3 *Br.* 400.

In Treſpaſs of Aſſault, Battery and Wounding, *&c.* if the Defendant plead that the Plaintiff beat him firſt, then he Juſtifies the wounding; but if he juſtifie by arreſt, or any other Cauſe which will bear him out only *molliter manus imponere*, then he pleads *quoad vulnerationem præd. ſuperius fieri ſupponit* Not Guilty, and the Arreſt or other Cauſe to the reſt, and concludes, *quæ eſt eadem inſult' verberatio & maletractatio*.

Wounding may not be juſtified in Defence of a Man's Poſſeſſion: but, *per Coke*, a Man may juſtifie the Wounding in Defence of his Perſon. 1 *Rolls Rep.* 19. *Butler* and *Auſtin*. So 21 *H.* 6. 27.

Treſpaſs for Aſſault, Battery and Wounding. The Defendant pleads *ſon Aſſault demeſne*. The Plaintiff

Plaintiff demurs; becauſe the Wounding may not be juſtified. It ſeems to ſome it's a good Plea; becauſe the Foundation of the Action is the Treſpaſs, to which this Plea is proper. *Siderfin p.* 246. *Dance* and *Lucy.*

Aſſault and Battery.

Bars, or Juſtifications in Defence { of Himſelf, of his Relations, of his Goods, of Land and Poſſeſſion, for Publick Good, by Caſtigation, by ſerving Proceſs.

In Defence of Himſelf.

If a Man aſſault me, if I can well eſcape him, I may not beat him.

If a Man aſſault me, I am not bound to attend till the other hath given a Cut, but I may beat him in my own Defence. 2 *Rolls Abr.* 547.

Son Aſſault Demeſne.

That is, where a Man juſtifies in his Defence, as being firſt ſtruck by the Plaintiff, and that he (the Defendant) ſtruck in his own Defence.

In Appeal of *Mayhem*, *ſon aſſault demeſne* is a good Juſtification; if he plead Not Guilty, he cannot give in Evidence that it was *ſe defendendo*; for that he ought to have pleaded it by way of Juſtification in Bar of the Action. *Co.* on *Magna Charta* 316.

In Treſpaſs of Aſſault and Battery, a Man may juſtify in Defence of himſelf, or for the Preſervation of his Poſſeſſion of Land or Goods. *Co.* 2 *Inſt. p.* 316.

p. 316. But he cannot juſtify *Mayhem*, or Wounding, or Menace of Life, or Member. *ibid.*

Treſpaſs for Aſſault, Battery and Wounding; the Defendant pleads *ſon aſſault demeſne*: the Plaintiff demurs, becauſe Wounding may not be juſtified by Plea. *Q. Siderfin p.* 246. *p.* 17. *Car. Car.* 2. *B. R. Dance* and *Lucy*. It was adjudged, That *ſon aſſault demeſne* is a good Plea; the Count being *quod mutilavit* only. 1 *Keb.* 884, 921. *meſme Caſe*. The Aſſault muſt be ſuch as is juſt Ground of Terror, as holding up a Sword, or running at him, which is examinable on Evidence. 1 *Keb.* 921.

The Form of Pleading Son aſſault demeſne.

Ra. Ent. 611. *Co. Ent.* 644. *Hern.* 34. *de inſultu in ſervien. Ra. Entr.* 613.

Treſpaſs for Aſſault, Battery and Wounding. The Defendant ſaid he was Conſtable of *D.* and for ſuch a Mildemeanour of the Plaintiff's, he laid his Hands on him and carried him to the Stocks *quæ eſt ead.* and on Demurrer it was adjudged *pro Quer.* for the Defendant did not plead Not Guilty to the Wounding, nor juſtified it: But if one pleads that the Hurt which the Plaintiff had was of his own Aſſault, this is a good Anſwer to all. *Cro. Eliz.* 268. *Pendleberry* verſus *Ellmott*.

Action of Battery was laid in the Declaration to be 18 *Febr.* the Defendant pleaded *ſon aſſault demeſne*: at Iſſue the Defendant proved an Aſſault by the Plaintiff, but at another Day. This doth not prove the Iſſue for the Defendant; becauſe the juſtification ſhall refer to the time laid in the Declaration, if the Defendant doth not difference the Times in his Plea; and in ſuch Caſe the Defendant ſhall ſhew that ſuch a Day (other than that in the

Declaration) the Plaintiff did him Aſſault, and traverſe the Day in the Declaration at a Tryal.

In Defence of Relations.

The Husband may juſtify the Battery of another in the Defence of his Wife. 2 *Rolls Abr.* 546.

The Maſter may juſtify the Battery of another in Defence of his Servrnt. *ibid.*

The Servant may juſtify the Battery of another in Defence of his Maſter. *ibid.*

Defendant (a Juſtice of the Peace) juſtifies, becauſe the Plaintiff's Wife being invited to a Funeral, refuſed to give place to the Defendant, *molliter manus impoſuit*, to put her out of her Place, *Judgment pro Quer'.* 3 *Keb.* 462. *Aſhton* and *Jennings.*

In Defence of his Goods, Lands and Poſſeſſion.

A Man may juſtify the Battery of another in Defence of his Goods.

If a Man will take Money out of my Purſe, I may juſtify the Battery of him in Defence of this.

If a Man takes the Beaſts of another Damage-feaſant, and an Eſtranger will take them out of his Poſſeſſion, he may well juſtify the Battery in Defence. 19 *H.* 6. 66.

Juſtific. in defence de cane odoriſequo. *Ra. Entr.* 611.

The Defendant ſaith that the Plaintiff *tempore quo Clauſum fregit, & Cuniculos ipſius Roberti ibid. invent. cum Retibus capere voluit, per quod Def. ut ſerviens al. R. & per ſon command. molit. manus impoſuit,* to hinder him from taking them. This is not a good Juſtification. *Cro. Eliz.* 242. *Barret* verſus *Haveſett.*

If

If a Man have Licence to erect a Booth in a Fair, and he being erecting it, another comes to pull it down, he may juſtify the holding of him by the Arms. 11 *H.* 6. 23.

Treſpaſs for killing a Maſtiff Dog, the Defendant pleads the Maſtiff was unmuzzled, and fell upon the Dog of *A.* in the Street, and he as Servant of *A.* killed him, it's an ill Plea; for he may not juſtify the killing of a Maſtiff Dog in which I have Property, without reaſonable Cauſe, and this is not here ſo, unleſs that he had pleaded that the Maſtiff was ſo fixt, *&c.* that he could not part them without killing the Maſtiff. He need not plead ſo had it been in a Warren. *Siderfin p.* 336. *Trin.* 19 *Car.* 2. *B. R. Wright* and *Rainſcar.*

The Defendant pleads *ſon aſſault demeſne* in an Action of Aſſault and Battery, the Plaintiff replied, That the Defendant would have forced his Horſe from him, whereby he did *molliter inſultum facere* on the Defendant, in Defence of his Poſſeſſion. The Defendant demurs, ill Plea; it muſt have been, he did *molliter manus imponere.* One cannot juſtify the beating of a Man in defence of his Poſſeſſion. Otherwiſe *Mod. Rep.* 36. *Jones* and *Treſilian.* 2 *Keb.* 597. *id.* Caſe.

If I lend an Horſe to *A.* for two days, to ride to *M.* and from *M.* to *B.* he rides him to *M.* and ſo to *London,* I cannot juſtify Battery of him to repoſſeſs my ſelf of my Horſe: for he hath a ſpecial Property during the two days, and I have other Remedy, *Telv. p.* 172. *Lee's* Caſe.

In Defence of Land and Poſſeſſion.

A Man may juſtify the Battery of another in defence of his Poſſeſſion, but not the Wounding. Co. 2 *Inſt.* 316.

If a Man come into a Forest in the Night, the Forester may not beat him before Resistance made by him. 2 *Rolls Abr.* 548. G.

A Man erecting a Booth in a Fair by Licence, and a Stranger throws it down; yet he may not justify the Battery. *Vide supra.*

I may justify the Battery of another who will enter into my House. 2 *Rolls Abr.* 548. G. 7. *Lawrence's* Case.

Trespass of Assault, Battery and Wounding; the Plaintiff justifies in defence of his Orchard, *quod molliter manus imposuit. Per Cur.* it's ill. But had it been *molliter manus imposuit*, and that the Plaintiff resisted, and thereupon the Defendant, *&c.* It hath been resolved that *molliter manus*, *&c.* the Defendant took up Stones and threw at the Plaintiff in defence of his Quarry, was no sufficient Justification. 3 *Keb.* 468. *Knightbridge's* Case. So of his Possession or Person. 2 *Rolls Abr.* 568. *Cole* and *Mander.*

The Defendant justified, for that the Plaintiff entred his Close, and that he *molliter manus imposuit.* *Q.* If he ought to shew what Estate he had in the Close, and that the Plaintiff came there to eject him. *Moor, Smith* and *Bull's* Case.

Justification for Publick Good, and for hindring Mischief, or preventing Disturbance and Indecencies in God's Service.

A. plays at Dice with *B.* in the House of a Justice of Peace, which *B.* was a Cheater, and the Defendant justifies in Battery, That he for the Cause aforesaid put his Hands upon him to bring him before the said Justice, who bound him over, and he was convicted as a Common Cheat. *Cro. Car. p.* 234. *Holliday* and *Oxenbridge.*

A. sets a Dog upon *B.* an Infant, and upon this

this C. comes to *A.* and puts his Hand *molliter* upon him to ſtay him. This is juſtifiable. 2 *Rolls Abr.* 546. C. 3. *Walter* and *Jones.*

In Aſſault and Battery in C. in *Com.* Y. the Defendant juſtifies, That at ſuch a Place in the County of *L.* one *J.* a Curate, was performing Divine Service and Funeral Obſequies, and the Plaintiff did malitiouſly diſturb him; and the Defendant did require him to deſiſt; and becauſe he would not, they to remove him did *molliter manus imponere, &c. abſque hoc,* that they were not guilty of any Aſſault in *Com.* Y. or elſewhere *extra Comitat. L.* It's a good Plea: for the Plaintiff, for this Diſturbance, was a Nuſance to them all. *Mod. Rep.* 168. *Glover* and *Hinde.*

In Aſſault, the Defendant juſtified as Church-Warden, That he pulled off the Plaintiff's Hat, he ſitting covered in time of Divine Service, having requeſted him to pull it off. It's good. So to ſwitch Boys playing in the Church-Yard. 2 *Keb.* 124. *Haw* and *Planner.* 1 *Sanders Rep.* 12. *meſme caſe.* The Form of pleading this, *vide* in *Sanders.*

One may tie a Mad-man, or catch one that is falling into Fire or Water, with Violence, *&c.* and juſtify it.

One may part two Men fighting, *&c.*

Juſtiff. per mandat' Majoris de F. ad removend' Quer' qui non habuit Votum in Electione Burgi Parl' ab eis qui habuere Votum & fuer' in Electione, &c. Tompſ. 306, 307.

Bar, quod molliter manus impoſuit ſuper Quer' & A. pugnant' ad eos ſeperand'. Ra. Entr. 613. 2 Browne 143. Tompſ. 336. 394.

Quod Quer' inſult' fecit in J. & Def. ad conſervand' pacem, &c. 2 Browne 137, 138.

Quod Quer' inſult' fecit in W. & Def. retraxit eum ne majus dampnum fieret. Ra. Entr. 612.

Deux Defendants plede ſon aſſault ſeperatim, & alius Def. plede molliter manus impoſuit pro preſervatione Pacis & ad al' Def. & quer' invicem ſeperand'. Tompſ. 408.

Juſtif. Aſſault, quod Def. fuit Guardianus Eccleſiæ, & quod Quer' tempore celebrationis Divinæ Servitij ſtrepitum fecit, & ſic Defend' ad compellend' e Quer' ex Eccleſia ire, fecit le Treſpaſs. Tompſ. 326. Reg. 612.

Juſtification of Aſſault by moderate Correction or Caſtigation.

The Defendant pleads the Plaintiff was his Servant, and for neglect of his Service *molliter manus impoſuit, &c. quæ eſt ead' vulneratio*; and further he pleads, That ſuch a Day and Place that the Plaintiff *exoneravit, relaxavit & quiete clamavit* to the Defendant all Actions. *Per Cur'* the Plea is double, and it ſhould have been he releaſed *per Scriptum. Siderfin p.* 175. *Bleek* and *Grove.* In this Caſe he ought to ſhew a Retainer, though in a *per quod Servitium amiſit* he need not.

In Treſpaſs for Battery brought by a Scholar, the Defendant pleads, he was his Schoolmaſter *ad erudiend' & informand' in facultate Legendi, &c.* and ſo it ought to be, for he may be a Schoolmaſter *in mala arte. Siderfin* 175.

The Defendant juſtified becauſe the Plaintiff is his Servant. and for neglect *moderate caſtigavit.* The Plaintiff replies, *non moderate caſtigavit*, and Iſſue *pro Quer'*. It ought to be *de injuria ſua propria*, yet now it's good *per Stat. Car.* 2. *Siderfin* 444. *Aubrey's* Caſe. 2 *Keb.* 623. *meſme Caſe.*

Juſtifi

Juſtification by ſerving Proceſs, and by aſſiſting Officers.

Tranſ. for Aſſault and Battery of the Wife in *L.* The Defendant pleads *Non culp.* to the Battery. And to the Aſſault, That in *D.* in another County at the View of Frank-pledge, a Warrant was made to the Defendant, then Conſtable, to take *A. G.* and to carry her to the Cook-Stool, by Force of which he commanded the other to aſſiſt him to execute the Warrant, whereby they came into the Plaintiff's Houſe, the Door being open, to enquire for *A. G.* where the Plaintiff's Wife made an Aſſault upon them, and the Conſtable commands the other Defendant *molliter manus imponere, quæ eſt eadem Tranſgreſſio, abſque hoc* that they were guilty in *L. vel alibi, vel alio modo extra D. præd'* within the Realm of *England.* The Plaintiff demurs; many Exceptions were taken to the Warrant; but *per Cur'* the pleading the Warrant was only Inducement, and if there had been no Warrant in the Plea, the Juſtification had been good enough. *Quære* if the Traverſe be good. *Vide Tit. Traverſe.*

The Defendant juſtifies by Force of a Warrant directed to him and to two others, or either of them, to arreſt the Plaintiff; and ſhews, that he himſelf and one other of the two arreſted him; yet this is good. *Vide Hobbs* and *King's* Caſe, 1 *Rolls Rep.* and *p.* 406. *Walcott* and *Empſon.*

Juſtification by Proceſs out of the Sheriff's Court in *London.* He ſaith there was a Plaint in ſuch a Court before *L. M.* and doth not alledge a Cuſtom to hold Court before the Sheriffs, and that *F. M.* was then Sheriff. 2. It's ſaid *coram F. M. uno Vicecomit'*, which is well enough, there being two Courts, though they are but one Sheriff; the Writ

is *Vicecommitibus London*, but *Vicecomiti Midd'*. 1 *Keb.* 564. *Osborn* and *Parker*.

Treſpaſs by Baron and Feme for Battery done to them both, *ad dampnum ipſorum*. The Defendant pleaded Not Guilty, and found for him, and certified that he did it as Conſtable in the Execution of his Office; and double Coſts were granted according to Stat. 7 *Jac.* 5. though the Declaration was ill; for Husband and Wife cannot join for Battery done to them both; for the Vexation appears. *Cro. Car.* 175. *Heyler's* Caſe.

Juſtification by Proceſs out of an Inferior Court of Record.

It is not good without ſhewing whether the Court be held by Charter or Preſcription. Sir *T. Jones*, *Strode* and *Deering*.

Courts not of Record.

Treſpaſs for the taking of his Cattle, and detaining them till he was forced to pay 2 *l.* 8 *s.* 2 *d.* the Defendant juſtified that *J. S.* levied the Plaint in the County-Court in a Plea of Debt of 39 *s.* 11 *d.* againſt the now Plaintiff, *& ſuper inde taliter proceſſum fuit*, that he recovered the ſaid Debt, and eight Shillings and four Pence for Coſts of Suit; *prout per proceſſ' inde in Cur' Com' præd' remanen' plenius apparet, & ſuper quo ad proſecutionem ipſius J. S. quoddam præcept' extra Cur' Com' præd' emanavit, per quod præceptum* the Sheriff commanded the Defendant to levy the Money, *&c.* by Virtue of which Precept he took the Cattle and detained them till the Plaintiff had paid the Money. The Plaintiff demurred, and adjudged for him.

1. Becauſe

1. Becauſe when a Judgment is pleaded in an inferior Court, eſpecially in a Court not of Record, the Proceedings ſhould be ſet forth at large, and not to ſay, *taliter proceſſum fuit.*

2. It is not ſhewed that the Debt aroſe within the Juriſdiction.

3. It doth not appear that the Court awarded the Precept; it is only ſaid, *quoddam præcept' e Curia emanavit, per quod* the Sheriff commanded, *&c.* Whereas the Suitors are the Judges; it ſhould be *per quod præceptum per præfat' Cur' directum fuit, &c.* 2 *Ventr.* 100. *Pinager* and *Gale.*

Excuſe of Aſſault and Battery.

One Train-Soldier hurts another in Skirmiſhing, and the Defendant pleads that *caſualiter & per infortunium, & contra voluntatem ſuam* in diſcharging of his Piece he did hurt and wound the Plaintiff, which is the ſame, *&c. abſque hoc* that he was guilty *aliter ſive alio modo.* The Plaintiff demurs, and Judgment for him. But had the Defendant ſaid the Plaintiff ran croſs his Piece when it was diſcharging, or ſet forth the Caſe with it's Circumſtances, ſo as it had appeared to the Court it had been inevitable, it had been good. *Hob.* p. 134. *Weaver* and *Ward.* He ought to have further ſaid, he could not avoid the Fact. *Moore meſme Caſe.*

No Man ſhall be excuſed in Treſpaſs (for this is the Nature of an Excuſe and not of a Juſtification *prout ei bene licuit*) except it may be judged utterly without his fault. *Hobart p.* 134. *Weaver* and *Ward.*

If two Maſters of Defence playing their Prize hurt one the other, Treſpaſs lies; but if one kill the other it's no Felony. *Hobart p.* 134.

Juſtif.

Juſtif. quod Quer' tempore Tranſgreſſionis & inſult' fuit un Eveſdropper. 2 Browne. 178.

Quod Def. fuit Sagittans cum Arcu longo ad Metas, & Quer' negligenter venit prope Metas, & ibid. contra voluntat' Def. fuit vulneratus in Pede cum Sagitta. 1 *Br.* 188.

CAP. IX.

What amounts to falſe Impriſonment, where the Action to be brought, of the Writ, Declaration and Pleadings in Bar, in Juſtification.

Faux Impriſonment *what it is, and when it ſhall be ſaid to be ſo, or not.*

IF a Serjeant in *London* refuſe to accept Bail, Action of Faux Impriſonment *vi & armis* doth not lie, but Action upon the Caſe. *Cro. Car.* 296. *Salmon* and *Percivall.*

If a Bailiff of a Sheriff refuſe to accept Bail, this Action lies not. 2 *Rolls Abr.* 562. 10. *Adams*'s Caſe.

If a Sheriff makes no Return, or a *Faux* Return, after the Party is arreſted, it is *Faux Impriſonment* in the Sheriff, and ſo of his Bayliffs. 2 *Rolls Abr.* 562, 563. *Parker* and *Moſs. Vide ſupra.*

A Priſoner ſhall have *Faux Impriſonment* againſt his Keeper if he remove him out of the Priſon into another County or Liberty. *Dier* 66. *Pl.* 12.

A.

A. procures the Sheriff to arreſt *B.* without Writ, and after purchaſeth a Writ, and the Sheriff arreſt the Party being in his Cuſtody, an Action of *Faux Impriſonment* lies. *Dier* 244. *Pl.* 61.

Proceſs iſſues to take a *Feme Sole*, and before ſhe be taken ſhe becomes a *Feme Covert*, and then is taken, Action of *Faux Impriſonment* lies. 2 *Bulſt.* 80, 81. *Doyly* and *White.*

A *Capias* iſſues againſt *J. G.* of *Dale*, Gent. and there are two of the ſame Name and Myſtery within the ſame Village; the Sheriff at his Peril ought to take him which is ſued. *Brok. Tit. Faux Impriſonment. Pl.* 19. 11. *H.* 4. 91.

The Writ againſt the Plaintiff was retornable *Octab. Purif.* (9 *Febr.*) the Defendant (the Sheriff's Bailiff) takes him the 10th of *Febr.* and before the 4*to die poſt*, it's unlawful. *Siderf.* 229. *Ellis* and *Jackſon. Mich.* 16 *Car.* 2.

Treſpaſs *quare vi & armis in Annam Filiam ſuam inſultum fecit, & ipſam cepit & impriſonavit.* The Father ſhall not have this Action; for none ſhall have Remedy for the Impriſonment, but the Party to whom the Wrong is done. *Cro. Eliz.* 770. *Barham* and *Dennis.*

Where the Action to be brought, vid. Venire.
Vid. Juſtific. Le Rule.

Per Stat. 21 *Jac. c.* 12. if any Action, Bill, Plaint or Suit upon the Caſe, Treſpaſs, Beating or Impriſonment, ſhall be brought againſt any Juſtice of the Peace, Mayor or Bailiff of City or Town Corporate, Headborough, Portreeve, Conſtable, Tithing-man, *&c.* or any of them, or any other who in their Aid or Aſſiſtance, or by their Commandment ſhall do any thing touching or concerning his or their Office or Offices, for or concerning any Matter Cauſe or Thing by them

or

or any of them done by Virtue or Reaſon of any of their Office or Offices, that the ſaid Action, Bill, Plaint or Suit ſhall be laid within the County where the Treſpaſs or Fact ſhall be done or committed, and not elſewhere; and if upon the Trial in ſuch Caſes the Plaintiff therein ſhall not prove to the Jury that the Treſpaſs, Beating, Impriſonment, or other Fact or Cauſe of Action, was had and made within the County wherein ſuch Action ſhall be laid, that then the Jury ſhall find the Defendants not guilty, without having regard to any Evidence given by the Plaintiff, *&c.*

The Writ.

Faux Impriſonment is brought by two; the Writ ſhall abate; they ought to ſever in Actions.

Declaration.

The Declaration is, *cepit & impriſonavit.* The Defendant pleads a Plea by Warrant from the Sheriff in a *Ca. Sa.* The Plaintiff replies, That a *Superſedeas* was delivered to the Sheriff, and yet after he detained him in Priſon; but ſaith nothing of the Caption whereof he complained in his Declaration, and ſo maintained not his Count. Judgment *pro Def.* for this Cauſe. *Cro. Eliz. p.* 404. *Stringar* and *Sanlack. Vide ſupra* in Aſſault, Battery and Impriſonment.

After a Verdict it hath been ruled, that it's good enough to ſay, one had impriſoned him for a long time, and *Rolls* conceived the Caſe in *Hobart* not well printed. *Stiles p.* 171. in *Ireland's* Caſe.

Juſtifi-

Juſtification to falſe Impriſonment, or where and in what Caſes a Man may Juſtify the Impriſonment of another, and where not.

By Officers.

Take this for a Rule:

The Juſtification ſhall be good though the Act be tortious, for that it was done by Order of Law. As,

The Sheriff may juſtify executing the Proceſs of the Court, although it is erroneous: as if a *Capias* comes to him without any Original, and he executes it. So if a *Capias* or an *Exigent* comes againſt a Duke or an Earl. 6 *Rep.* 54. 9 *Rep.* 68. 10 *Rep.* 70, 76. *Dier* 61. *Hob. p.* 48.

Juſtification by Warrant out of *Durham*, though the Proceedings were irregular; yet ſeeing they could grant a *Capias*, that excuſeth the Officer. *Mod. Rep.* 170.

Juſtice of Peace errs in his Warrant, yet he that makes the arreſt ſhall be puniſhed in *faux Impriſonment*. So in Diſtreſs. 2 *Rolls Abr.* 560. *Nicholl's* Caſe.

Bail is taken by *Capias* where it ought to be *Scire Facias*, yet juſtifiable *per l'Officer*. 10 *Car. B. R. Seaborn* and *Sawaker*, 2 *Rolls Abr.* 560.

By an Officer for Ill Behaviour.

The Sheriff or other Officer meets with a Man who misbehaves himſelf, he may commit him to Priſon and Juſtify. 2 *Bulſtr.* 328. 9. 2 *Br.* 221.

In *faux Impriſonment*, the Defendant juſtifies, that he was Sheriff of *London*, and had arreſted one *Clare*, who had eſcaped, and in Purſuit of him about nine a-Clock at Night in *February* the Plaintiff

tiff met him and uſed him indecently, *& luy detruſit uſq; ad murum, & permulta verba incivilia a luy dedit, ſuper quo il inveniens le Plaintiff vagrantem in nocte & male geſtant' verſus luy, il luy impriſon'*, &c. *Per Cur.* the Juſtification is good; for all being joined together is a good Cauſe of Impriſonment. If a Man do ſuch an act againſt a Conſtable, it's a good Cauſe of Impriſonment; and a Conſtable may arreſt a Man for breaking the Peace upon himſelf. 1 *Rolls Rep. p.* 237. *Chune* and *Piott.* 2 *Bulſtr. p.* 328. *meſme Caſe.*

The Defendants being Juſtices of the Peace do juſtify *per Stat.* 1 *Mariæ*, made againſt Diſturbers of Preachers in the Church. *Vide* an excellent Argument as to the Pleadings in this Caſe by all the Judges of the King's Bench about Miſrecital of the Statute. 2 *Bulſtr.* 47. *Creſwick* and *Rookesby.*

One may juſtify Impriſonment for Suſpicion of Felony, if the Suſpicion be violent. 3 *Leon. p.* 233. *Sparrie's* Caſe. *Dier p.* 236. *Pl.* 26. *&* 11 *Rep.* 92. But one may not arreſt for Felony upon another Man's Suſpicion. 2 *H.* 7. 15. 15 *H.* 7. 5. 20 *H.* 7. 12. *Dier* 222. For Suſpicion of Hue and Cry one may. 2 *Rolls Abr.* 559. 2 *Bulſtr.* 259. 10 *Rep.* 76.

One called the Mayor of *B.* a Fool, the Mayor cannot juſtify the impriſoning him. *Aliter* had the Mayor been in Publick Place of Juſtice. *Cro. Eliz. p.* 78. *Simons* and *Sweet.*

The Defendant Juſtifies that Sir *R. L.* being Lord Mayor and Juſtice of Peace in *London*, *pro diverſis Cauſis eid. Majori bene cognit'*, commanded him, being Serjeant at Mace, to impriſon the Plaintiff. Ill Plea: for he ought to ſhew the Cauſe of the Impriſonment, ſo as the Court may judge whether it be lawful or not. *Cro. Jac.* 81. *Boucher's* Caſe.

Treſpaſs for Battery and Impriſonment. The Defendant juſtifies by Execution of a Writ: but upon the Plea it appears to be executed after the Day of the Return, but before the *quarto die poſt*, and the Execution was adjudged to be illegal. *Moore* 733. *Cro.* 3. 180. Judgment *pro Quer.* 1 *Levinz* 143. *Ellis* and *Jackſon*. *Windham* cited a Caſe to be, where the Writ by the Roll was award returned upon *Wedneſday*, and it was made returnable upon *Thurſday*, and executed upon the *Thurſday*, and the Writ ordered to be amended according to the Roll, and the Execution upon the *Thurſday* void.

Treſpaſs and *faux Impriſonment* in *London*. The Defendant pleads *J. S.* ſued forth a Writ of *Latitat* the laſt day of *Trinity*-Term, directed to the Sheriff of *R.* and by Virtue of that the Sheriff of the ſaid County made a Warrant to the Defendant, and he upon that took the Plaintiff, which is the ſame impriſonment, *abſque hoc*, that he is guilty in *London*, *vel alit. vel alio modo*. The Plaintiff replies, That the ſaid Writ was truly proſecuted after the Impriſonment (*viz.*) the 9th Day of *Auguſt*. The Defendant demurs. And adjudged *pro Quer.* becauſe although the *Teſte* of the Writ be upon Record, and the Plaintiff cannot aver againſt it, yet here great Inconveniencies will be, if the Plaintiff cannot ſet forth the very time of the Purchaſe of the Writ, and the Relation of the *Teſte* is only to prevent Fraud, and not to juſtify a Tort: and Judgment *pro Quer.* *Raym.* 161. *Bilton* verſus *Johnſon*, &c.

Treſpaſs of Battery and Impriſonment. The Defendant juſtifies by Writ out of the King's Bench directed to the Sheriff, and a Warrant upon it made to him. The Plaintiff demurs ſpecially, for that it is not pleaded that the Writ was delivered to the Sheriff as the uſual Form is. *Per Cur.* it need

need not be ſo pleaded; for if in Truth a Writ be ſued, although he make a Warrant before it comes to his Hands it is legal, and the Preſidents are both ways. 2 *Levinz* 19. *Jones* and *Green*.

By Sheriffs Bailiffs.

If the Sheriff makes a falſe Return, or no Return; he cannot juſtify the Arreſt. As *Capias* in Proceſs iſſues againſt *J. S.* and the Sheriff takes him, and after returns *non eſt inventus*, or makes no Return, he is a Treſpaſſor *ab initio*, and *faux Impriſonment* lies againſt him. So if a *Capias* in an Inferior Court directed to an Officer to take *J. S.* and he takes him; and doth not return the Proceſs. So if Bailiffs, Errant or Special, take a Man, and the Sheriff doth not return the Writ, they are Treſpaſſors. 2 *Rolls Abr.* 563. *How*'s Caſe.

In Treſpaſs of *faux Impriſonment* againſt a Sheriff and Bailiff, they juſtified by Warrant on Writ to the Sheriff. The Plaintiff replies no Writ was then taken out. The Defendant demurs. Judgment *pro Quer.* For albeit the Bailiff hath a Warrant, yet he is liable if there be no Writ. 2 *Keb.* 705. *Pluncknet* and *Green*.

The Defendant juſtified by *Latitat* to the Sheriff and Warrant to himſelf; to which the Plaintiff demurs ſpecially, becauſe it's not ſhewed that any Writ was delivered to the Sheriff before the Arreſt, nor Warrant made before the Arreſt. *Per Cur.* this is no eſſential Matter, nor traverſable; and the Plaintiff might have replied the Arreſt was before the Delivery of the Writ; elſe the Court will intend it delivered, it being ſaid, that *Virtute* of a Writ delivered to the Sheriff and a Warrant, the Defendant arreſted. 2. *Except.* It's not averred the Writ was returned, *ſed non allocatur*; for though Bailiff of a Liberty muſt return his Precepi;

cept, yet Bailiff *itinerant* need not. 2 *Keb.* 838, 844. *Green* and *Jones.* And by his Demurrer the Plaintiff hath admitted the Delivery of the Writ, though he hath ſhewed the want of Averment for Cauſe. 1 *Sanders* 298.

The Sheriff, after having received Execution-Money, ought not to arreſt the Party, and if he be arreſted, he may well diſcharge him, *per Clinch* and *Gawdy.* *Cro. Eliz. p.* 404. *Stringar* and *Stanlack.*

Faux Impriſonment againſt an Under-Sheriff. The Defendant pleads, the Plaintiff was taken in Execution upon Proceſs out of the Exchequer at the King's Suit, and that afterwards he was ſerved with a *Latitat* out of the King's Bench at the Suit of *B.* and that after one *H.* was made Sheriff of the ſaid County, and he was his Under-Sheriff, and the old Sheriff delivered the Plaintiff over to him. The Plaintiff replies, That after the Delivery over to the Defendant, a *Superſedeas* was directed out of the Exchequer to deliver him if he were taken, and that notwithſtanding this, he after detains him in Priſon *ea de cauſa & non alia*: and further for the other Cauſe, That after the Delivery over, *B.* the Plaintiff in the *Latitat*, diſcharged and releaſed the Action, and required the Defendant to deliver him, and yet he would detain him. The Defendant demurs: 1. Becauſe the Action is brought for the Caption and Impriſonment, and in the Replication he maintains by Cauſe of a Detainer after a Diſcharge, and ſo a Departure. *Per Cur.* the Detainer is a Caption and new Impriſonment. 2. Becauſe the Detainer is lawful after *Superſedeas* directed, he being taken. *Per Cur.* in the Exchequer they have Power to diſcharge a Man in Execution, and the *Superſedeas* was a ſufficient Diſcharge. As to a third Point, the Court held, the Party Plaintiff may diſcharge him if he

make an Agreement with the Party. If a Man be in Execution, if he at whoſe Suit he is in Execution command the Sheriff to deliver him, if he detain him after in Priſon, action of *Faux* Impriſonment lies againſt him, and he cannot juſtify it. Judgment *pro Quer.* 1 *Rolls Rep.* 240. *Withers* and *Henly*, 2 *Bulſtr. p.* 96. *meſme Caſe.*

As the Sheriff may not juſtify the detaining his Priſoner after a *Superſedeas*, ſo neither may he juſtify the retaking of one whom he hath arreſted upon Proceſs, and let to Bail, and returned *Cepi Corpus*, after an *Habeas Corpus* delivered to him to remove the Body. 2 *Rolls Abr. p.* 558. *Layes* Caſe.

If he arreſt the Party after a *Superſedeas* (though he knows nothing of it) it's *faux Impriſonment. Cro. Eliz.* 98.

Action againſt the Defendant of *faux Impriſonment.* Now *Faux Impriſonment* doth not lie againſt a Sheriff for refuſing ſufficient Bail, but Action on the Caſe. 2 *Mod.* 31. *Smith* and *Hall.*

After Plaint entered in the Porter's Book, and before Entry before the Sheriff in the Counter, a Man may be arreſted. 9 *Rep.* 68.

The Defendant juſtifies by arreſt on *Latitat.* the Plaintiff replies, The Writ was taken out after the Arreſt. The Defendant demurs, and Judgment *pro Quer.* 3 *Keb.* 213. *Chancy* and *Rutter.*

The Defendant juſtifies an Arreſt *quouſque* Bond given to appear in the King's Bench, *abſque hoc* that at any time he did arreſt without reaſonable Cauſe until he gave ſuch Bond. *Per Cur.* the Juſtification is good; and the Plaintiff ſhould have traverſt *abſque hoc* that he was arreſted and detained till Obligation to appear in *B. R.* having counted that this was taken on Attachment out of Chancery, and *nil cap. per Billam* awarded *ſu. Demurr'.* 3 *Keb.* 165. *Dawſon* and *Rawliſon.*

Fo

For all the Impriſonment, except eleven Hours, the Defendant pleads Not Guilty; and to the Impriſonment for eleven Hours he juſtifies as Sheriff, for that the Plaintiff hindered him in the Execution of his Office, and ſaith nothing to the *vi & armis*, yet good. 1 *Sanders* 81. *Law* and *King*. and there *vide Forme del Pleading*.

In this Caſe of *Law* and *King*, the Defendant juſtified as Sheriff of *Coventry* to arreſt him for the Breach of the Peace upon him *in Executione Officij*, whereby he arreſted him and brought him before the Mayor, and traverſeth all the time before, that he was Sheriff and after, and the Traverſe adjudged good although it was objected to be too lazy. 1 *Levinz*. 216.

After the Day of the Return the Sheriff cannot juſtify executing, *&c.* but on the Return Day he may. 1 *Keb.* 805.

The Defendant (a Serjeant) juſtifies by reaſon of a Plaint entred. The Plaintiff replies, That after the Arreſt he tendered him ſufficient Bail, (*viz.*) *J. S.* and *J. D.* notwithſtanding which he detain'd him in Priſon, *& hoc, &c. Per Cur.* when he juſtifies the Arreſt and Impriſonment, his refuſal of Bail makes not the Arreſt and Impriſonment tortious ſo as to have Treſpaſs; perhaps Action on the Caſe lies. *Cro. Car.* 196. *Salmon* and *Percivall*.

If the Sheriff himſelf juſtifies by Writ, it's no Plea without ſhewing the Return of the Writ; but *aliter* of a Sheriff's Bailiff, for he hath no means to enforce the Sheriff to make Return thereof, and what he did was legal. *Cro. Car.* 447. *Girling*'s Caſe.

The Defendant juſtified that he had a Warrant to arreſt *J. D.* and he demanded of the Plaintiff what was his Name. He anſwered, His Name was *J. D.* and therefore he arreſted him. Ad-

judged for the Plaintiff, for the Defendant at his Peril ought to take notice of the Party. *Moore, Coote* and *Lighworth*'s Caſe.

Treſpaſs by the Plaintiff, being a Parſon, for the taking of his Beaſts. The Defendant juſtifies by Warrant of a Juſtice of the Peace to take them for a Levy for repairing of High Ways. The Plaintiff demurs, pretending that the Lands of the Church are not ſubject to ſuch Charge. But *per Hale & Cur.* new Charges by Statute they are ſubject as others, if not excepted: and Judgment *pro Def.* 2 *Levinz.* 139. *Webb* and *Batchelor.*

In Treſpaſs and *faux Impriſonment* the Defendant juſtified for that a general Quarter-Seſſions of the Peace was held 9 *Oct.* 27 *Car.* 2. and that the Juſtices make a Warrant to him to bring the Defendant to the Seſſions; and that he 10 *Oct. Virtute Warranti præd.* took the Defendant for to bring him to the Seſſion, and detained him for a Quarter of an Hour, and then the Defendant reſcued himſelf. On which the Plaintiff demurs generally; and adjudged for him; for the Bar is ill, not averring the continuance of the Seſſion 10 *Oct.* for otherwiſe it ſhall not be intended, nor the ſaying he took him *Virtute Warrant' præd.* will ſupply it. 2 *Levinz.* 229. *Doughty* and *Mills.*

Juſtification by Aſſiſtants to Sheriff or Bailiff.

The Sheriff makes a Warrant to the Bailiffs to arreſt *J. S.* and they have arreſted him, and they intreat *J. D.* to keep him until he be delivered by the Sheriff; this is juſtifiable by *J. D.* in an Action of *faux Impriſonment* againſt him. *Cro. Car. p.* 446. *Girling* and *Allen.* So if a Stranger, after the arreſt of a Priſoner, comes in Aid of the Bailiffs, and aid them to keep him in their Cuſtody

dy by Command of the Bailiffs, this is juſtifiable. 2 *Rolls Abr.* 561.

That the Defendant came to aſſiſt the Sheriff in a *Vi Laica removenda*, and there *querentem in domibus prædict. ad pacem Domini Regis diſturband. eos reſiſtentem invenerunt* : a good Juſtification. 2 *Rolls Rep.* 177. Parſon *Cloſſes* Caſe.

Treſpaſs of Battery and Impriſonment 13 *June* 23 *Car.* 2. The Defendant pleads, That 16 *Mar.* an Attachment iſſued out of Chancery to the Sheriff, and that the Sheriff after the Delivery of the Writ to him, 27 *May* makes his Warrant to the Defendant his Bail, by which he took him *eodem* 27 *die Maij*, and traverſeth all times before the Warrant or after the Return of the Writ. The Plaintiff maintains his Declaration, *abſque hoc* that the Writ was delivered to the Sheriff before the Battery and Impriſonment. The Defendant rejoins, That before the Return of the Writ it was delivered to the Sheriff, *viz.* the ſaid 27th day of *May*, and that before the Arreſt he had no notice but that it was delivered to the Sheriff. The Defendant rebuts as before, That he had not notice but that the Writ was delivered to the Sheriff before the Arreſt, *& de hoc ponit, &c.* The Plaintiff demurs, Judgment *pro Defendente.*

1. It's not material if the Writ be delivered to the Sheriff before the Warrant and Arreſt, ſo long as in *rei veritate* there is a Writ, which warrants all.

2. There being a Writ and Warrant upon it, the Bailiff ſhall not be charged for the executing of it; for he is not privy, nor hath notice of the time of the delivery of it to the Sheriff, and he had tendered an Iſſue of the notice, which the Plaintiff had refuſed to accept. 3 *Levinz.* 93. *Osborne* and *Brookhouſe.*

Juſtification by a Conſtable.

In Treſpaſs for breaking his Houſe, the Defendant juſtifies as Conſtable, by Virtue of a Warrant to him directed from a Juſtice of Peace for the taking the Plaintiff and bringing him to anſwer, and by this he broke open the Door at eleven of the Clock at Night, *&c.* *Per Cur.* by this general Warrant he cannot juſtify unleſs for Felony or Treaſon. 1 *Bulſtr.* 146. *Foſter* and *Hill.*

The Defendant juſtified he was Conſtable, and the Plaintiff being in Preſence of a Juſtice of Peace, not having opportunity to examine him, commanded the Defendant to take the Plaintiff into his Cuſtody till the next day, which he did. It's a good Juſtification without alledging what Cauſe the Juſtice had to examine him. *Q. More, Broughton* and *Mulſhoe's* Caſe.

The Defendant ſaith he was Conſtable, *&c.* and that the Plaintiff the ſaid Year, Day and Place, brought an Infant, not above the Age of ten Years, in his Arms, and left him on the Ground, and that he commanded the Plaintiff to take up the ſaid Infant and carry it away, which he refuſed to do, for which Cauſe he committed the Plaintiff to the Stocks. A good Juſtification. *Popham Rep.* 12. *Cro. Eliz.* 287. *Beal* and *Charter. Vide* the ſame Caſe 1 *Leon.* 327. a little more fully reported.

If a Conſtable ſees any breaking the Peace, he may take and impriſon him until he find Surety by Obligation to keep the Peace. *ibid.*

The Defendant juſtifies as Conſtable, for breaking the Peace upon himſelf. 1 *Rolls Rep.* 237 *Chune* and *Piott.*

The Defendant justifies that he was Constable of *B.* and that he appointed the Plaintiff to watch there, and because he refused he put him in the Stocks. It's an ill Plea, because the Defendant doth not shew the Plaintiff was an Inhabitant there, and he cannot appoint a Stranger to Watch by any Statute. *Crok. Eliz.* 204. *Stretton* and *Browne.*

In *faux Imprisonment*, it's justifiable by a Deputy-Constable by Virtue of a Warrant. 1 *Rolls Rep.* 274. *Phelps* and *Winchcomb*; and also he is within the Stat. 7 *Jac. c.* 5. for Costs.

Trespass and Battery. On Not Guilty, a special Verdict. The Plaintiff being complained of to a Justice of Peace, he makes a Warrant to the Defendant to take the Plaintiff, and to find Sureties for the Good Behaviour, the Defendant being Constable, executes the Warrant on a *Sunday*, and whether it be good within the late Statute, which says, That all Process executed upon a *Sunday*, other than for the Peace, shall be void. Resolved for the Defendant. A Warrant for the Good Behaviour is a Warrant for the Peace and more; and this Statute is to be favourably extended for the Peace, and this Judgment was affirmed in Error in *B. R. Raym.* 250. *Johnson* against *Colison.*

Of *Justification by Warrants, Precepts of Sheriffs, Mayors, Marshals,* &c. *and Pleadings thereon.*

In some Cases it may be good, though no Cause be expressed in the Warrant; and the Tip-Staff of the King's Bench may justify the Imprisonment of a Man by a Parol-Warrant of the Chief Justice. 2 *Rolls Abr.* 558. Sir *George Throgmorton* and *Allen*; though it be regularly true, that

If a Man will juſtify the Impriſonment of another by Warrant, he ought to ſhew the Warrant. 10 *Rep.* 92. a.

In *faux Impriſonment*, the Defendant juſtifies by a Warrant of the Sheriff on a *Latitat*. The Plaintiff replies, *De Injuria ſua propria*. On demurrer this is naught, being matter of Record: yet upon Iſſue and after a Verdict, it's a Jeofail, the Iſſue being in the affirmative.

The Defendant juſtifies Impriſonment of the Wife by Precept in *Warwick*, returnable *ad proximam Curiam*, not ſaying at what day. *Per Cur.* the Proceſs is good enough, *contra* to *Dier.* 2 *Keb.* p. 702. *Gibs* againſt *Stratford*.

Note, a Juſtice of Peace his Warrant is not always a Security. As the Church-Wardens of *D.* tax the Inhabitants of *S.* to the Poor of the Pariſh of *D.* and for default of Payment have the Juſtices Warrant upon Stat. 43 *Eliz.* and the Church-Wardens take a Diſtreſs of the Inhabitants of *S.* They brought Treſpaſs. This Warrant will not juſtify them: for the Church-Wardens and Juſtices had no Power to Charge them. 10 *Car. B. R. Rot.* 222. *Nichols* and *Walker*.

In an Action of Aſſault, Battery and Impriſonment till the Plaintiff had paid 11 *l.* 10 *s.* the Defendant pleads and juſtifies by reaſon of an Execution and a Warrant thereupon for eleven Pounds, and mentions not the ten Shillings; and on demurrer, for this Cauſe Judgment was given *pro Quer.* upon the firſt opening; becauſe it appears that the Defendant took more than was warranted by the Execution. 2 *Mod.* 177. *Harding* and *Ferne*.

The Defendant juſtifies, That the Court of the *Marſhalſea* hath Juriſdiction to hold all Pleas of Treſpaſſes within the Verge; and ſhews, That he himſelf affirmed a Plaint of Treſpaſs in the Mar-

ſhal's

ſhal's Court, *&c.* and a Precept was made to the Marſhal *ad habend.* his Body at the next Court, *&c.* and the Officer (*Portator Virgæ*) took him, and the Defendant came in Aid of the Officer, *&c.* The Plea is ill; for it ſaith, the Precept or *Capias* is returnable at the next Court, and it is not upon any day certain; for ſo he may be detained in Priſon a long time, not knowing when the Court ſhall be holden. *Cro. Jac.* 314. *Johns* and *Smith.*

The Sheriff makes his Warrant to three Bailiffs to do Execution *conjunctim & diviſim*, and two execute it, it's good enough. 2 *Rolls Rep.* 138. *White* and *Wiltſhire.*

The one juſtifies by a Sheriff's Warrant, and ſaith not *hic in Curia prolat.* it's good, becauſe it appears by the Record that he returned the Warrant to the Sheriff, and ſo need not ſhew it. 1 *Rolls Rep. Bateman's* Caſe.

Treſpaſs againſt *Julian G.* Widow; hanging the Suit ſhe takes *D.* to Husband. Judgment is given for *Julian G.* The Plaintiff reverſeth the Judgment by Writ of Error, and had a Warrant to take *Julian D.* It's a good Juſtification in *faux Impriſonment*; for *Perſona denotatur per Recordum.* 2 *Bulſtr.* 80, 81. *Doyly* and *White.*

By Proceſs out of other Courts.

The Defendant juſtifies by Proceſs to the Bailiff out of the Court of the Honour of *P.* and doth not ſhew any Proceſs was return'd, which being an immediate Officer ought to be ſhewed; *contra* of an under Officer. 2 *Keb.* 156. *Haywood* and *Wood.*

Proceſs out of a Court *Virtute Literarum Patentium* is good in Juſtification. But in a *Quo Warranto* or any Action for the Court, they muſt be ſet forth: and in Actions between Parties where

where there is no queſtion of the Juriſdiction, they need not ſet them forth. 2 *Keb.* 104, 156. but it muſt be ſpecially pleaded that ſuch a Court was granted, and that *Virtute cujus, &c.* 156.

In *faux Impriſonment*, the Defendant (Warden of the Fleet) juſtified by Virtue of an Order of Chancery, that he ſhould be committed to the Fleet. It's an ill Plea, becauſe an Order is not ſufficient; it ought to have been an Attachment. He ſhould have pleaded, *Quoddam Breve de Attachiamento. Mod. Rep.* 272. 2 *Sanders* 182. *Furlong* and *Bray. contra* 2 *Rolls Abr.* 559. *Taylor* and *Bele.*

Treſpaſs of Battery and *faux Impriſonment* until he paid 28 *l.* The Defendant, as to all beſides the *faux Impriſonment*, pleads Not Guilty; and as to that he pleads, he was Steward of the Stannaries, *&c.* and commanded the Officer of the Court to take him until he paid the 28 *l.* *Per Cur.* this is not repugnant in it ſelf: for an Anſwer to the Impriſonment is an Anſwer to the Money paid, 1 *Rolls Rep.* 264. *Eveley* and *Sloley*, *vide* 1 *Keb.* 205. *Cramp.* and *How* cited in *Prideaux* Caſe.

In Aſſault, Battery and *faux Impriſonment*, the Defendant juſtifies on *non omittas* out of *C. B.* directed to the Sheriff of *L.* returnable *Oct. Pur.* and his Bailiff arreſted the Defendant the tenth day of *Febr.* which was the day after the Eſſoyn-day, but before the *quarto die poſt.* *Per Cur.* after the Day of Return the Sheriff cannot execute it, but on the Return Day he may. Judgment *pro Quer.* 1 *Keb.* 805. *Ellis* and *Jackſon.*

The Defendant juſtifies by Force of a Proceſs out of the Palace Court, (*viz.*) That a Plaint in Nature of an Action on the Caſe was entred there againſt the Plaintiff, and that Summons was againſt him, and after that a *Capias*, by Force of which he

he was impriſoned. It's an ill Plea. *Siderfin p.* 248, 259. *Rogers* and *Marſhall.*

Note, Judgment is vacated; yet the Officer is excuſed for executing the Writ, the Party not. The Caſe was:

A Man had a Judgment and Execution executed; and after the Judgment was vacated for being unduly obtained, and Reſtitution awarded. And after the Defendant brought Treſpaſs againſt the Plaintiff in the firſt Action for taking the Goods, and adjudged it well lies againſt the Party; for by the vacating of the Judgment, this is as if it had never been, and not like a Judgment reverſed by Error. And note, this Action was againſt the Party, and not againſt the Sheriff, who had the King's Writ to warrant him, which is ſufficient for him. For in Treſpaſs or *faux Impriſonment* it ſufficeth the Sheriff to plead the Writ only; but the Party ought to plead not only the Writ, but the Judgment alſo. But *Twiſden* ſaid he was not ſatisfied with this Judgment when it was given in the time of *Glyn* Chief Juſtice; neither yet is for to make a Man a Treſpaſſor by Relation; for when the Execution was ſerved there was a Judgment, although that after the Execution was vacated. 1 *Levinz.* 95. *Turner* and *Felgate*'s Caſe.

Treſpaſs and *faux Impriſonment.* The Defendant juſtifies by Warrant out of the Court of the Admiralty, which recites a Cauſe depending in the Court of Admiralty *de re Maritima*, commanding the Defendant, their Officer to take the Plaintiff, upon which he took him. It was ſaid the Plea was ill, not averring that the Cauſe was Maritime, ſo that it might be tried if it were ſo or not; and if it be not within their Conuſance, their Warrant cannot juſtify the Officer. But by *Hale* and *Cur.* it will be too hard to put the Officer in ſuch a caſe to ſhew the Cauſe to be within the Juriſdiction

riſdiction of the Court; it is ſufficient for him to plead the Warrant, which he is bound to obey; and in this Caſe it doth not appear but that the Cauſe was within the Juriſdiction of the Court. 2 *Levinz.* 231. *Otto* and *Selwin.*

Treſpaſs of Aſſault and Impriſonment. The Defendant pleads, that 26 *Febr.* in the Palace one levies a Plaint againſt the Plaintiff, and the Defendant (as Serjeant of the ſaid Court) takes him by Virtue of Proceſs upon this Plaint. The Plaintiff demurs. Argued *pro Quer.*

1. It doth not ſay that the Palace-Court is by Preſcription or Letters Patents.

2. It's ſaid that C. levied a Plaint in the Nature of an Action on the Caſe, and upon this a *Capias* iſſued, and the Officer returned it: The immediate Proceſs here is Attachment by the Goods, where it ought to be a Summons. *Reſp.* 1. It's a Court of Record, which ought to have ſuch Proceſs. 2. Summons doth not lie in an Action on the Caſe, but a *Capias* lies in Treſpaſs in any Caſe, and it's a general Entry in all Courts. 3. Summons is not a Proceſs in an Action on the Caſe, but a *Pone.*

3. A *Capias* lies not in an Inferior Juriſdiction.

Reſp. Admit this Proceſs does not lie in an Inferior Court; yet the Court having Juriſdiction, the Officer is not to be puniſhed.

Twiſden. This is cured by Appearance.

Windham. It ſeems Proceſs in an Action on the Caſe was a *Capias Infinite.*

Judgment *pro Def.* *Raym.* 129. *Rogers* and *Maſcall.*

In Aſſault, Battery and *faux Impriſonment*: As to the Impriſonment he juſtifies by a Proceſs out of an Inferior Court; and upon a Demurrer theſe Exceptions were taken to his Plea:

1. The

1. The Defendant hath ſet forth a Precept directed *Servienti ad Clavam*, and it is not ſaid *Miniſtro Curiæ*.

Reſp. A Precept may be directed to a private Perſon, and therefore *Servienti ad Clavam* is good enough.

2. It was to take the Plaintiff and have him *ad proximam Curiam*, it ſhould have been on a day certain, as *Cro. Jac.* 571.

Reſp. It's well enough; and how can it be on a day certain, when the Judge may adjourn the Court *de die in diem*?

3. It's not ſaid *ad reſpond' alicui*.

Reſp. Yet good enough, though not ſo formal.

4. It's not ſaid the Action aroſe *infra Burg.*

Reſp. The Defendant ſets forth, That he did enter his Plaint *ſecundum Conſuetudinem Curiæ Burgi*; and when the Plaintiff declared there, he ſhewed that the Cauſe did ariſe *infra Juriſdictionem.*

5. The Precept is not alledged to be returned by the Officer.

Reſp. The Officer is not puniſhable, though he do not return the Writ.

The Court held the Plea to be good *in omnibus.* 2 *Mod.* 58. *Crowder* and *Goodwin.*

Treſpaſs for Aſſault, Wounding, Taking and Impriſonment. *Quoad* the Aſſault and Wounding the Defendant pleads *Non Culp. Quoad* the Taking and Impriſonment he juſtifies by Warrant; and becauſe he doth not juſtify the Aſſault in the taking, it's a Diſcontinuance. 2 *Bulſtr.* 335. *Wilſon* and *Dodd.*

Per Stat. 7 *Jac. c.* 5. if any Action on the Caſe, Treſpaſs, *&c.* ſhall be brought againſt any Juſtices of the Peace, Mayors, Bailiffs of Cities or Towns Corporate, Conſtables, *&c.* or any their Aſſiſtants for or concerning any Matter or Thing

by

by them done by Virtue of their Offices, it ſhall be lawful for every Perſon and Perſons aforeſaid to plead the General Iſſue, and to give the Special Matter in Evidence.

An Action was brought, for that the Plaintiff being a Freeman, who had a Voice in the Election of a Mayor, the Defendant (being the preſent Mayor) refuſed to admit his Voice; and upon Iſſue and Trial the Plaintiff was Nonſuit, but the Roll not marked for double Coſts. The Statute gives double Coſts where the Officer is ſued for Matter in doing his Office; here the Suit is for Nonfeſance. *Cur.* This Caſe is not within the Intent of the Statute, the Scope of which was where the Mayor, *&c.* were ſued for *faux Impriſonment*, or ſuch Matters where they ought to juſtify, it gives Liberty to them to plead the General Iſſue, and double Coſts. 2 *Levinz* 250. *Herring* and *Finch.*

Juſtification by Cuſtom.

In *faux Impriſonment* the Defendant juſtifies by a Cuſtom of *London* of the Court of *Orphans*, that if an Orphan be taken out of Cuſtody, to impriſon the Party till he ſhall produce the Orphan, or be delivered by courſe of Law, and good. *Siderf.* p. 17 *Car.* 2. *B. R. Wilkinſon* and *Bolton. Vide* 1 *Levinz* 162. *meſme Caſe.*

It was objected that the Plea was not good, to take a Man without notice of his Crime, and to bring him to the Court, and immediately to commit him; he ought to have notice for what he was brought to Court, ſo that he might be prepared to anſwer. But *per Cur.* this pleading that he had committed the Offence, and was convict for it, and the Matter is Criminal, for which any Juſtice of Peace may commit.

Impriſon-

Impriſonment juſtifiable by others not being Officers.

A Man may impriſon another to prevent apparent Miſchief which may enſue; as a Feme Covert who is mad, and would kill one, or burn an Houſe.

If a Man ſee two Men fighting, ſo that one is in danger to be killed by the other, it's lawful for him to part them, and put them into an Houſe until the Fury be paſt: but he may not juſtify it if there be only Words. 2 *Rolls Abr. p.* 559.

If a Man be wounded and like to die, any Man may arreſt him that gave this Wound, and he may be kept a Priſoner till it be ſeen that the Danger is paſt. 16 *H.* 7. 38.

Juſtification by a Governor of an Iſland.

Treſpaſs of Aſſault, Battery and Impriſonment. The Defendant juſtifies as Deputy-Governor to Sir *W. Godolphin* in the Iſle of *Scilly*, and pleads the Iſle is an ancient Iſle, and that within it time out of Memory, *&c.* was a Caſtle, and there was a Governor and a Deputy-Governor of the Caſtle, and Miniſters and Soldiers attending for the Defence of the Iſle, which receive Wages of the King, and have been under the Government and Puniſhment of the Governor, or (in his Abſence) of his Deputy, for Offences in their Duty; and a Cuſtom, That if any Miniſter or Soldier ſhall refuſe to obſerve his Duty, and perſonally appearing before the Governor, or Deputy-Governor, and required to render his Obedience ſhall obſtinately refuſe to do it, or give opprobrious Words, *&c.* then they uſed to chaſtiſe them by Impriſonment by a reaſonable time; and ſhews the Plaintiff's

tiff's Diſobedience and contumelious Words, whereby he impriſoned him. The Plaintiff demurs generally, and Judgment for him. Sir *T. Jones* 147. *Ekins* and *Newman*.

Pleading of the Statute of Limitations in Aſſault, Battery and Impriſonment.

Prideaux *and* Webber.

Treſpaſs for Aſſault, Battery and Impriſonment 1 *May* 1657. The Defendant pleads, That *Tranſgreſſio Inſultum & Impriſonamentum præd'* were made the 24th of *October* 1655. and pleads the Statute of Limitations. The Plaintiff replies, That certain Rebels (not naming them) had uſurped the Government, and none of the King's Courts were open. The Defendant rejoins and confeſſeth the Uſurpation; and further pleads the Act of Pardon of all things, and Acts of Hoſtility made under the Uſurped Authorities; and further pleads the Act for Confirmation of all Judicial Proceedings in the late Times; and further pleads a Warrant to impriſon him, *& hoc paratus, &c.* The Plaintiff demurs.

1. It was argued for the Plaintiff, That the Plea in Bar was ill, not anſwering to the Battery. But it was anſwered and reſolved by the Court, That *Tranſgreſſio præd.* is an Anſwer to all.

2. It was reſolved that the Statute of Limitations was a Bar, though it be (as it was pleaded) that the Courts were not open; becauſe there was not any Exception in the Act of ſuch a Caſe; and Infants had been bound if they had not been excepted.

Obj. The Rejoinder was multifarious and impertinent, in pleading the two Statutes and in not concluding upon the Statutes, *prout patet per Recordum.*

cordum. But *per Cur.* the Bar being good, and the Replication being inſufficient, it is not material what the Rejoinder is, And Judgment for the Defendant. 1 *Levinz* 31.

CAP. X.

Of Torts to Chattels Reals and Perſonals, De Averijs *in General and in Particular, Tort to Goods, with Preſidents of Declarations, and Rules of Pleading.*

Tort al Chattels, *or of Treſpaſſes done to Chattels Reals.*

TReſpaſs for taking his Son and Heir and Marrying him, and the Declaration. 2 *Inſt.* 440. *Stiles Rep.* 235. *Wood's* Caſe. *N. B.* 90. *H.* 3 *Rep.* 38. 39. 6 *Rep.* 22. 7 *Rep.* 12.

For taking away the Wife *cum bonis Viri. vide ſupra.* and *Dier* 256. *Tompſon* 294.

One may have this Action for taking away his Servant. *Dier* 256. *Pl.* 10. 2 *Rolls Abr.* 556. 11, 12. *Winch. p.* 51.

As to the Battery of a Servant *vide prius.*

For taking away one's Apprentice the Action lies, 1,1 *B.* 91. *I.* 8 *H.* 6. 28. *vide ſupra.*

Treſpaſs lies by a Goaler for taking away his Priſoner. *Stiles Rep.* 99, 100. *Reg. Orig.* 104. And likewiſe the Party at whoſe Suit he is arreſted. *Stiles* 44. 342. becauſe after he is arreſted he hath an Intereſt in the Body of the Party. *Stiles p.* 342. *Gough* and *Cann.*

Treſpaſs for taking away his Captive from him. *Reg. Orig.* 95. a. 102. b.

The Defendant reſcued the Party out of Execution, the Action may be brought at the Suit of the Party who had the Damage, or by the Sheriff. *Hetly p.* 98. *Congham*'s Caſe.

In an Action of Treſpaſs *quare Clauſum fregit, & ſolum & fundum* (*viz.*) *duas acras terræ fod. ſubvert. & aſportavit.* Verdict *pro Quer.* It was moved in arreſt of Judgment, That the Declaration was inſufficient as to the Digging and carrying away the Soil; for *duas acras terræ* doth not expreſs the Quantity of the Earth, but the Meaſure and Extent of the Ground where the Digging was. And Judgment was ſtayed. 2 *Ventr.* 174. *Higham* and *Darby.*

Treſpaſs lies for Marriage of a Woman by Force and Dureſſe. *Aſſize Long* 5 *Ed.* 4. 61. b.

De inſultu & minatione cujuſdam R. P. & filii & ſervien. per quod ſervitium amiſit. Bar *quod præd. R. P. cepit juvencum Def. & fecit Aſſault ſuper Def.* Tomp. 389, 390.

Torts to Chattels Perſonals, and of Declarations thereupon.

De Averijs *in General.*

In Treſpaſs for driving Cattle to Places unknown, whereby the Plaintiff loſt them. The Declaration is ill; becauſe by this the Plaintiff ſhall have Damages as well for the chaſing as the driving whereby he loſt them; which may not be as to the Damages for the loſing. *Siderf. p.* 295. *Cooper* and *Cottabed.*

A Man may not be guilty of Treſpaſs with Cattle, unleſs that they are his proper Cattle, or that he actually put them into the Place where, *&c.*

&c. 1 *Sanders p.* 27. Earl of *Mancheſter* verſus *Vale.*

Treſpaſs for Chaſing ſo that one of the Beaſts died. The Defendant juſtified by *leviter* driving them to the Pound; he muſt traverſe *abſque hoc*, that one of them died of the Chaſing. *Coply* and *Ferrer*'s Caſe cited, 2 *Keb.* 601. *Leech* and *Midgly.*

De Averijs interfect. Townſ. 272, 273.

De Averijs *in Particular.*

De libero Tauro abduct. Reg. Orig. 109.
De Equo vel Vacca interfect. Reg. 109.

Treſpaſs for that *apud E. in Com. K.* he killed his Dog, being a Maſtiff Dog. The Defendant pleads, That Sir *F. W.* was ſeized of a Warren in Fee in *D.* within the ſame County, whereof he is and then was Warrener, and that his Dog was divers times killing Coneys there; and therefore he finding him there *tempore quo, &c.* running at Coneys, he Killed him: *abſque hoc, &c.* that he is guilty *apud E. prout, &c.* It's a good Juſtification, and the Traverſe is good, the Cauſe of Juſtification being local, and ſo he need not traverſe all other places. *Cro. Jac. p.* 44. *Wadhurſt* and *Dance.* Dogs.

Treſpaſs for taking away his Maſtiff; but it ſhall not be ſaid *Pretij* or *ad valentiam.* 7ᵉ *Rep.* 18. 12 *H.* 8. 3. *Reg.* 109.

De Cane vocat' a Bloodhound, *abduct'.* Kit. 225.

Narr' pur peircement d'un Chein avec un coſteau per que il moruſt. 1 Sanders 82.

Treſpaſs for the taking away a Greyhound with a Collar. The Defendant ſaith, The Dog was courſing an Hare in his Land. An idle Plea.

Cro. Jac. 463. *Athell* and *Corbett.* Trover lies not in this Caſe.

Pro duobus Canibus abduct' & interfect'. Juſtif. virtute Warr' Juſtice del Pace pro captione Canum predict'. Repl. De Injuria ſua propria abſque tali cauſa. Tomp. fo. 359.

Treſpaſs *quare vi & armis cepit & abduxit quendam Canem venaticum pretij.* Hob. p. 283. Edwards *verſus* Engleton.

If a Dog chaſe and kill the Beaſts without my Incitation, in Treſpaſs I may plead Not Guilty. *Dier* fo. 29. *Pl.* 195. 2 *Car. p.* B. N. *Millen* and *Fawdry.*

Treſpaſs *quare* two Dogs, called Greyhounds, *ipſius le Plaintiff, cepit & interfecit.* The Defendant juſtified, For that the Greyhounds chaſed a Doe in his Park, and there killed him, for which, to prevent him for doing further Miſchief, he killed him. The Plaintiff replies, The Doe was out of the Park in the Land of the Plaintiff feeding, by which he ſet on the Greyhounds to chaſe her out of his Land, and that they purſued the Doe into the Park, and there killed her. Upon which the Defendant demurs. *Per Cur.* the Replication is ill, becauſe he doth not ſay he did his endeavour to ſtop the Greyhounds at the ſide of the Park, and hinder them from entring into the Park. 3 *Levinz* 28. *Barrington* and *Turner.*

De Cane ad mordend' Oves conſuet. Vid. infra. *Et ad mordend' homines, &c.*

Juſtification by the Plaintiff's own Careleſneſs. 2 *Brown. p.* 175.

Treſpaſs for killing a Maſtiff Dog. Plead, The Dog was not muzled, and ran violently on the Dog of *B.* and he, as Servant of *B.* killed the Dog. Ill Plea, becauſe he ſaith not he could not otherwiſe prevent it. 1 *Sanders* 84. *Wright* and *Ramſeott. Siderfin p.* 336. *meſme Caſe.* In 1 *Levinz*

vinz. 216. is the ſame Caſe. He ſaith the Plea was adjudged ill, not only for the Reaſon in *Sanders*, a Maſtiff being valuable. But 2. It doth not appear that the Plaintiff's Dog was uſed to bite, nor that the Defendant's Dog was a Maſtiff.

Declaration was, *Quendam canem ad mordend' oves conſuet', &c. ſcienter retinuit:* and not good. He ought to ſay, *Quod ſciens canem, &c. ſcienter retinuit:* For it may be, *ſcienter retinuit canem*, and yet knew not that he was *conſuet' ad mordend' oves. Cro. Car.* 487. *Kinman* and *Davis.*

A Man hath not an abſolute Property in Beaſts *feræ naturæ:* he may have Property qualified in them ſo long as they remain tame, and Property poſſeſſory they may have *ratione impotentiæ & loci*; as young Goſhawks which air in my Land, I ſhall have a Property poſſeſſory in them, and if any take them the Owner ſhall have Treſpaſs. 7 *Rep.* 17. b. Caſe of Swans. 3 *Leon.* 219. *Ireland's* Caſe. 2 *Leon.* 201, 201. Beaſts in Parks and Warrens.

But when one had Beaſts Salvages *ratione privilegij*, as by reaſon of a Park, Warren, *&c.* he hath not Property in the Deer, Coneys, Pheaſants or Partridges. *Ergo*, if one bring an Action of Treſpaſs *quare Parcum ſuum fregit, &c. & tres Damas, Lepores cepit, &c.* he ſhall not ſay *ſuos. Ra. Entr.* 650. 3 *Br.* 479. *Townſend* 269. *col.* 1. *Cro. Car.* 554. *Child's* Caſe. And yet for Deer in a Park, Coneys in a Warren, the Owner hath ſpecial Property in them as long as they are in the Park or Warren. So of Doves in a Dove-Coat. But for Deer or Coneys, if they be not in a Park or Warren, he may not ſay *ſuos*, unleſs he add that they were Domeſtick. *Vide* 7 *Rep.* 17. b. *N. B.* 86. 2 *Leon.* 201.

If a Keeper follow a Buck which is chaſed out of the Park, although he who hunteth him killeth the Buck in his own Ground, yet the Keeper may enter into the Ground and ſeize the Deer, becauſe the Property and Poſſeſſion of the Deer is yet in him by Purſuit. 12 *H.* 8. *Reg.* 102.

An Action was brought *quare ducent' Cuniculos ſuos, pretij, &c. cepit.* But then they were in the Warren.

A Commoner cannot deſtroy and kill Coneys on his Land. 2 *Leon.* 201. 202. *Cro. Eliz.* 242. *Barret's* Caſe.

If Coneys go out of the Warren, any Man may kill them on his own Land. 5 *Rep.* 104.

Treſpaſs for entring and breaking his Cloſe, and fiſhing in *ſeperali Piſcharia ſua*, and for taking *Piſces ſuos, ibid. videl.* 100 Eels; to ſay *Piſces ſuos* is good, becauſe they were in *ſeperali Piſcharia. Cro, Car.* 553. *Child* and *Greenhill.*

Birds.

De Columbis capt. cum Retibus. Reg. 96, 106. 1 Br. 166.

De cato project. in Columbare, &c. Reg. 106.

De Volucribus capt. 140 Reg.

For taking away young Goſhawks Treſpaſs lies, for he had Property poſſeſſory. So if Hawks are reclaimed. 7 *Rep.* 17. b. *Reg. Orig.* 93, 96. *N. B.* 89. K.

De Clauſo fracto & Phaſianis capt. 1 Br. 67.

Treſpaſs for ſtriking and killing an Hawk, and ſaith not that ſhe was reclaimed, yet good. *Aliter in Trover. Cro. Car.* 18. *Vincent* and *Leſney. Dier* 14 *Eliz. Spencer* and *Fines.*

Treſpaſs lies for killing Pidgeons in a Dove-Houſe. And *per Mountague*, for killing them out of the Soil of the Owner. The Writ ſhall ſay, *Columbas ſuas. 2 Rolls Rep. p.* 32.

Tort

Tort al (biens) *to Goods.*

In Treſpaſs for Goods the Declaration ought to lay the Property of the Goods in the Plaintiff at the time of the taking: As *ipſius quer.*. 3 *Bulſtr.* 303. *Whiteman's* Caſe.

For dead things it ſhall be *bona & catalla ad valenciam*; but if it be for one thing it ſhall not be ſaid, *bona & catalla*; but you muſt name the thing it ſelf, except *Frumentum* and Wine. *Survey del Ley*, 361, 362. 46 *Ed.* 3. 16. *Pl.* 12.

If *A.* take away my Goods, and after *B.* takes them away from *A.* I may have Treſpaſs or Trover againſt one or the other at my Election, though the Opinion in *Croke* is, I ſhall not have Treſpaſs againſt *B.* *Siderfin* 438. in *Wilbraham* and *Snow.*

De bonis capt. Ra. Entr. 615, 635, 663, 667, 676, 681. *Reg.* 108. Capt'.

Goods ſtollen out of an Inn. *Dier p.* 158. b.

De bonis aſportat. per Original in B. R. *Juſtif. per Diſtreſs pur Rent.* Tomp. 357. Aſportat'.

De Clauſo fract. conculcatione & conſumptione Herbæ pedis ambulando, ac de aſportatione bonorum & catallorum. 2 Brown 252., 258, 271, 281.

Wool diſtreined until *C.* and *D.* bind themſelves to make Delivery. Treſpaſs *vi & armis* lies, and Value ſhewed. 43 *Ed.* 3. 6. *Pl.* 18. Diſtrict' & arg reſtata.

Frumentum. The Writ was *bona & catalla*, and good. 46 *Ed.* 3. 16. *Pl.* 12. Corn and Grain

Quare cepit quaſdam Garbas Tritici. It's not good for the Uncertainty. *Survey de Ley*, 363.

Tithes. *De Bladis ſeperat' pro Decimis aſport'.* Co. Entr. 678, 686.

De Clauſo fract. Herba conculcat. alia Herba depaſt. & Feno pro Decimis expoſit. diſperſ. ſuper Herbam querentis. Hern. 725. *Dier* 36. *Pl.* 39.

Herriot. For ſeizing an Herriot unjuſtly. *Cro. Jac.* 50.

Quare cepit & imparcavit averia carucæ, it may be *vi & armis*, and *contra formam Statuti* in general, is good enough; and he need not ſay that there is ſufficient Diſtreſs *preter, &c.* for it ſhall come on the other part to ſhew that there was not. *Siderfin p.* 348.

Beaſts of the Plow. Treſpaſs on Stat. 1 *R.* 3. *c.* 3. for taking the Plaintiff's Goods (being arreſted for Suſpicion of Felony) before Conviction, and declares of ſeizing a certain parcel of Money. Verdict *pro Quer.* It was moved in arreſt of Judgment, becauſe the Words of the Statute are, That none ſhall ſeize the *Goods* of any Perſon, and Money is not Goods. *Fitz. Brief.* 512. But adjudged for the Plaintiff, and that Money is Goods. *Raym.* 414. *Osborne* and *Wandell.*

If a Man do voluntarily take away my Goods or Cattle, and keep them till I pay him Money, either without Colour or with Colour, as under Pretence that it is Herriot, Waif, Eſtray, when it is not ſo; and if he will not reſtore the thing taken till I give him Money or Bond, I ſhall have it all in Damages. *Brok. Treſp.* 345.

Writings. Treſpaſs *quare bona & catalla ſua cepit (viz.) unum ſcriptum Obligatorium, in quo continetur quod J. S. tenetur al Plaintiff in* 100 l. He Declares of divers Goods and Chattels; and amongſt others

others, of the taking of an Obligation. It's not good. For an Obligation, or the Value of this may not be demanded by the Name of *bona & catalla*; for by ſuch general Name Obligation doth not paſs. *Yelv. p.* 68. *Channel* and *Robotham.*

De Baga cum Chartis aſportat. Ra. Entr. 616. In a Cheſt. 36 *H.* 6. 26. *Ra. Entr.* 7.

Pro Guardianis Eccleſiæ de Charta Annuitatis capt. lacerat. &c. Ra. Entr. 7.

Pro fractione Sigilli ſcripti Obligatorij. 1 Brown 367. Reg. 106.

Pro Dilaceratione ſcripti Obligatorij. 1 Brown 367. Tompſ. 292. vid. Reg. 110, 106, 111. 92, 107.

C. C. ſeized of the Mannor of *Eaſt H.* enfeofs *H. R. Per Cur.* Indenture rend. 60 *l.* at two Feaſts, *&c. C. C.* by Indenture bargains and ſells the 60 *l.* to the Plaintiff for all his Eſtate, which was enrolled, by which he was ſeized of the Rent for the Life of *C. C.* and ſo ſeized loſt the Part of the Indenture ſealed by *H. R.* which came to the Defendant's Hands, who, *vi & armis*, teared the Seal off the ſaid Indenture, *contra Pacem.* The Defendant pleads, *C. C. non conceſſit* the Manor of *Eaſt H.* to *H. R.* rendring the Rent, *&c. Modo & Forma.* The Plaintiff demurs. The Plea in bar is not good: For the Defendant deſtroys the Action of the Plaintiff but by Argument; and the Rent by this Action is not demanded, but Damages for tearing of the Indentures. But the Declaration is ill: 1. The Action is brought for tearing the Counterpart, by which the Rent was not created. 2. It's not averred that *C. C.* for whoſe Life the Rent was reſerved, was living; and if he be dead, the Deed belongs to the Defendant as Heir of *C. C.* 3. The Plaintiff doth not ſhew any Poſſeſſion in fact of the Deed, but only

only by way of Argument, *i. e.* That he caſually loſt it. 4. The Counterpart whereof the Plaintiff complains, of the Plaintiff's own ſhewing, as well compriſeth Warranty as Rent, and this doth not paſs by the Law to the Plaintiff without ſpecial Gift thereof made by *C. C. Yelv. p.* 223. *Sutcliff* verſus *Conſtable. Nota ceo caſe.*

Boards. *Quod fregit, &c. & aſportavit* his Boards. The Defendant juſtifies for that the Plaintiff had fixt them to his Houſe ſo that he had Property in them 2 *Rolls Rep.* 238.

Cloaths. For taking away two Trunks, and doth not ſay what Cloaths, and yet good. *Stiles* 352. *Web* and *Waſhborn.*

For breaking open two Cheſts, and taking away certain Cloaths and three Pounds in Money; and it appears not where the Cloaths were when they were taken, whether in the one Cheſt or in the other: and it was naught. *Stiles p.* 43. *Vincent's* Caſe. *Allen's Rep. meſme caſe.*

Beams and Weights. Treſpaſs for taking away Beam, Scales and Weights, and ſhews not what Weights; it's ill *Stiles Rep.* 352. *Web's* Caſe.

CAP.

CAP. XI.

Of Torts done to Inheritance and Free-hold, and what belongs thereunto.

Torts to Inheritance, and other Things appurtenant.

I Shall firſt ſet down ſome General Rules, and then go to Particulars.

The Plaintiff ought to ſhew the Village in which the Inheritance corporate lies, otherwiſe there can be no *Venue*. *Surv. Ley* 349.

If a Man enter into my Houſe againſt my Will, this is a Treſpaſs although the Door be open. 2 *Rolls Abr.* 555.

The Land of every Man is in Law encloſed from others, though it lie in the open Field, and the Writ ſhall be *quare Clauſum fregit*. *Doct.* and *Stud. cap.* 8. *lib.* 1.

Treſpaſs for entring into his Cloſe ſuch a day, and detaining Poſſeſſion until the time of exhibiting this Bill, and alledgeth not any day when the Bill was exhibited. Verdict *pro Quer.* and moved in arreſt, becauſe the time of the Detainer ought to have appeared to the Jury, and the Courſe is to limit a time in the Declaration. 2 *Rolls Rep.* 135. *Sliford* and *Goodwick.*

Treſpaſs for unearthing a Badger. The Defendant juſtifies, That a Vermin (called a Badger) was found there, *ad dampnum Inhabitantium*, by Reaſon whereof he uncoupled his Hounds in the Place where, *&c.* and hunted and found the Badger, and chaſed him until he Earthed him in the Place where, and thereupon digged the Ground and took the Badger and killed him, *quæ eſt ead'*

Tranſ.

Tranſ. The Action well lies; for hunting is the ordinary Courſe, and the digging for him is unlawful. *Cro. Jac.* 321. *Genſh* and *Mynns.*

Treſpaſs for digging his Land and carrying away certain Loads of Earth, not ſhewing what kind of Soil it was; yet good: But it ſhould have been of Soil *inde provenien.* *Stiles p.* 23. *Barrett's* Caſe, and *p.* 43.

If one make a Ditch, or raiſe a Bank to hinder my Way to my Common, I may juſtify the throwing of it down, and filling of it up. *Stiles Rep.* 470. *Williamſon's* Caſe.

De Bladis & Herba.

Treſpaſs *quare Clauſum fregit*, and threw down his Fences. The Defendant pleads Not Guilty to all but the breaking of the Fences; and for that he Juſtifies, For that he was poſſeſt of certain Corn in the Place where, as of his proper Goods, and made a Breach in the Fence as was neceſſary for the carrying of it away. The Plaintiff demurs ſpecially, becauſe he did not ſhew by what Title he was poſſeſt of the Corn. *Per Cur.* for this reaſon the Plea is inſufficient. 1 *Ventr.* 221. *Petrot* and *Bridges.*

Patentee del Roy de Herbagio Foreſtæ, ſhall have Treſpaſs againſt any who conſume or deſtroy the Graſs, but not the Trees; and alſo ſhall take the Beaſts there Damage-Feſant; and the Writ of Treſpaſs ſhall be *Quare Clauſum fregit. Dier* 285. *Pl.* 40.

The Plaintiff declares of eating his Graſs *cum quibuſdam averijs*, and doth not ſay what Beaſts, and yet good after a Verdict, *per Roll.* This Action is brought for Damages: But where the thing it ſelf is in demand, and an Action is brought for it as

as in Trover, the thing ought to be particularly named. *Stiles p.* 170. *Brook* verſus *Brook.*

For taking and eating his Graſs *ad tunc & ibid. nuper creſcen. Quære* if it be not contradictory. It ſhould be *ad tunc & auxi nuper. Siderfin p.* 295. *Cooper's* Caſe.

Treſpaſs for driving Cattle over the Plaintiff's Ground. The Caſe was, *A.* hath a Way over *B.'s* Ground to *Blackacre*, and drives his Beaſts over *B.'s* Ground to *Blackacre*, and then to another Ground beyond *Blackacre. Per Cur.* by this means the Defendant might purchaſe a thouſand Acres adjoining to *Blackacre*, to which he preſcribes to have a Way, and thereby the Plaintiff might loſe the Benefit of his Land: And that a Preſcription preſuppoſed a Grant, and ought to be continued according to the Intent of its original Creation. *Mod. Rep.* 190. *Howell* verſus *King.*

Treſpaſs by Executor *de bonis aſportatis in vita Teſtatoris.* The Plaintiff declares, That the Defendant *blada creſcentia* upon the Free-hold of the Teſtator, *meſſuit defalcavit cepit & aſportavit. Per Cur.* it's but one entire Treſpaſs; the Declaration deſcribes only the manner of taking it away. Had it been *quare clauſum fregit & blada aſportavit*, it had been naught; or if he had cut the Corn and let it lie, and then took it away, no Action would have lain for the Executor, for that had been Felony. 1 *Ventr.* 187. *Emerſon's* Caſe.

Treſpaſs *quare vi & armis apud Manerium* Toll-Booth. *ſuum de H. erexit quoddam Velabrum* (*Anglice* a Toll-Booth) *& vi & armis cepit Tolnetum, &c.* and diſturbed him in gathering Toll *ad feriam ipſius Quer. ſpectan. Per Cur.* it's good enough *vi & armis*, though it were no Breach of the Soil; neither need he make any ſpecial Title to the Fair, this being a poſſeſſory Action, and is a ſufficient

ficient Poſſeſſion againſt a Stranger; and the *vi & armis* he took Toll, is well enough. *Cro. Jac.* 122. *Dent* and *Oliver*.

Warren. *De libera Warrena fract. ac venatione inde & cuniculis occiſis.* Tompſ. 291, 293. vide ſupra cap. precedenti, & infra.

De Molendin. Piſchar. gurgit. & pontibus.

There be divers Forms of Writs for fiſhing in his Piſchary; one is, *quare in vivariis ſuis piſchatus fuit.* Another, *quare in ſeperali piſcharia ipſius A. piſchatus fuit.* If a Man let out the Water to the end to take Fiſh, he is a Miſeſor within the Statute *W.* 1. *c.* 20. but not by carrying the Water away. Collateral Treſpaſſes neither in Parks nor Fiſh-ponds, *&c.* are within this Act. If one hunt in a Park, or fiſh in a Pond, *&c.* though he kill no Deer, nor take any Fiſh, yet this is a Miſeaſance within thit Statute. *Co.* 2 *Inſt. p.* 200. *verſus Malefactores in Parcis & Vivariis.* 1 *Browne* 368. *W.* 1. *c.* 20. *Dier* 238. a. 326. *Pl.* 3.

De ſeperali Piſcharia piſchat. Aſht. 440. Dier 267. Pl. 14. Cro. Car. 554. *Child*'s Caſe, and the Declaration ſhall be *Piſces ſuos.*

Bar by Preſcription. *Dier* 267.

Treſpaſs for taking and cutting his Nets and Oars. The Defendant juſtifies, For that he was ſeized in Fee of a ſeveral Piſchary, and that the Defendant, with divers others, endeavoured with their Oars to row upon his Water, and with the Nets to catch his Fiſh; and for the Safeguard of his Fiſhing, he took and cut the Nets and Oars. It's an ill Plea; for he cannot by ſuch Colour cut the Nets and Oars; but he might have taken them

as

as Damage-Feſant, to ſtop their further Fiſhing. *Cro. Car.* 228. *Reynel* and *Champernoon.*

De claiis & palis fixis in gurgite quer. retibus poſit. & piſcibus capt. Reg. 103, 109.

De ponte fracto. Reg. 106.

De fractione capt. & aſport. ponti lignei quer. ex tranſverſo cujuſdam foſſat. in via pedeſtri poſit. 1 Browne 361.

De Parcis & Warrenis.

For Chaſing or Hunting in a Free Warren Treſpaſs lies.

Treſpaſs lies at Common Law for breaking his Park; but not for Savages taken, by the Statute. 2 *Rolls Abr.* 550.

A. had free Warren in the Soil of *B.* *A.* ſhall not have Action of Treſpaſs *vi & armis verſus* B. *quare in libera warrena ſua latibula ejuſdem warrenæ proſtravit, per quod cuniculi de eadem warrena interier.* but *A.* is put to his Action on the Caſe againſt the Owner of the Soil. 2 *Rolls Abr.* 550. Sir *William Mounſon's* Caſe.

Treſpaſs *quare clauſum fregit, nec non liberam warrenam* of the Plaintiff *intravit*, and killed and carried away Coneys. The Defendant juſtified as a Commoner; and many of the Coneys being on the Common Damage-Feſant, he entred and chaſed them out. *Per Cur.* ill Plea. The Commoner cannot kill the Lord's Coneys, nor meddle with them: If the Lord ſurcharge the Common by Reaſon of them, his Remedy is by Aſſize, or Action on the Caſe. So long as the Coneys are in the Lord's own Land the Lord hath a Property in them, and he may ſay *cuniculos ſuos.* Now when he ſhews that this Intent was to enter and chaſe the Coneys, his Entry was tortious. *Cro. Jac.* 145. *Hoddeſdon* and *Gryſell. Paſch.* 44 *Eliz.*

Bellew

Bellew and *Langdon. Mich.* 9 *Car.* 13. Sir *Will. Mounſon's* Caſe.

The Defendant juſtifies Aſſault and Battery by a *molliter manus, &c.* to hinder him from taking the Coneys. *Cro. Eliz. p.* 243. *Barrett's* Caſe.

De clauſura & obſtructione viæ quam quer. habuit. 1 Browne 384.

De Arboribus.

If the Leſſor cuts the Trees without Licence or Will of the Leſſee, an Action of Treſpaſs by the Leſſee lies againſt him. *Dier* 90. b.

If the Leſſee cuts the Trees to repair the Houſe, and after the Leſſor takes them away, this Matter is not in bar of Waſte, for that the Leſſee may have an Action of Treſpaſs. *Dier* 90. b.

A Man gives to me all his Trees growing in his Cloſe, and notwithſtanding this he cuts them down himſelf, and preſently I take them and carry them away, and he brings Treſpaſs againſt me *quare vi & armis arbores ſuas ſuccid. cep. & aſport.* I may plead as to the cutting down, Not Guilty, and juſtify for the reſidue. *Dier* 305. *Pl.* 57.

Treſpaſs *vi & armis* doth not lie againſt Leſſee for Years, who cuts the Timber-Trees down, and ſells them; but if he cuts them down and lets them lie, and after carries them away, ſo that there is ſome time for the diſtinct Property of a divided Chattel to ſettle in the Leſſor, then the Action lies. *Allen p.* 82, 83. in *Udall's* Caſe.

Vide plus poſtea, Bar de Arboribus.

The Leſſor excepts the Trees in his Leaſe; he may have this Action *quare clauſum fregit* for Treſpaſs done in them. *Dier* 19. 8 *Rep.* 63.

Several

Several Treſpaſſes.

De clauſo fract. ac bladis ac herba depaſt. Rā. Entr. 662.

De clauſo fract. herba conculcat. januis & ſepibus proſtrat. & bonis capt. Coke's Entries, 651.

De clauſo fracto, herba conculcat. januis & ſepibus proſtrat. & bonis capt. Coke's Entries, 651.

L CAP.

CAP. XII.

Of the Common Bar, Novel Aſſignment and Colour of Bars in Treſpaſs.

Le Common Bar, *the Reaſon of it.*

COmmon Bar, *un Cloſe de paſture noſme Stubbs; Novel Aſſignment de 2 pieces de Terre en B.* Winch. p. 1085.

In Treſpaſs *quare clauſum fregit*, if the Plaintiff do not in his Declaration ſhew a Place where the Treſpaſs was done by Name or Abuttals, then the Defendant by Plea pretends a wrong Place, where be ſure the Plaintiff hath no Title; which is called the Common Bar, which forceth the Plaintiff to aſſign a Place, which is called in pleading, the New Affignment.

Treſpaſs *quare clauſum fregit apud S.* for digging his Soil. The Defendant pleads, That the Place where is two Acres of Land called *Blackacre*, which is his Free-hold, and ſo juſtifies. The Plaintiff ſaith that the Place called *Blackacre* is his Free-hold, *abſque hoc* that it is the Free-hold of the Defendant. Demur, becauſe it is but a Common Bar, or as it is commonly called, a Blank Bar, and it is only pleaded to enforce the Plaintiff to aſſign his Treſpaſs in a Place certain, the Declaration being general, and therefore the Bar not traverſable. *Quære Cro. Jac. p.* 594. *Rickman* and *Cox.*

As for Preſidents of Common Bars, *vid. Townſend's* Tables, 275.

Of

Of the Novel Aſſignment, *and the Nature and Reaſon of it.*

Uſually after the Common Bar hath been pleaded in an Action of Treſpaſs, there is a new Aſſignment of the Place, and then the Pleading is in Juſtification, or other ſpecial Plea, or Not Guilty to the new Aſſignment.

This new Aſſignment is often uſed to clear a Title which upon it comes in Queſtion.

A New Aſſignment is in the Nature of a Replication; and it is uſed for the better ſetting down and aſcertaining of the Time and Place, *&c.* which was not well aſſigned before, but generally in the Declaration. As the Plaintiff declares in Treſpaſs for breaking his Cloſe, cutting down Graſs, *&c.* in ſuch a Pariſh and County. The Defendant pleads and ſays, That the Place where, *&c.* are ten Acres of, *&c.* and are his own Freehold, *per quod* he entred, *&c.* as into his Freehold, *&c.* Then the Plaintiff ſays or replies, The Cloſe and Place where, *&c.* are twenty Acres of, *&c.* lying in the Pariſh of, *&c.* and called and known by the Name of, *&c.* other than the ſaid Acres mentioned in the Defendant's Plea; and for that the Defendant hath not anſwered to the Treſpaſs in the twenty Acres newly aſſigned, the Plaintiff *pet. Judgment, &c.* to this new Aſſignment the Defendant muſt plead, if he hath any thing in Bar thereof. *Brook Tit. Treſp.* 212.

In Treſpaſs the Plaintiff may aſſign his Treſpaſs only in one Town, and if he do aſſign a Place, the Defendant may plead at another Place without traverſing the Place aſſigned by the Plaintiff; and then the Plaintiff may take a new Aſſignment. But in Replevin you muſt aſſign a Place as well as a Town; and in ſuch Caſe, the Place as well

as the Village are traverſable by the Avowant. *Hob. p.* 16. *Read* verſus *Hawk.*

In *quare clauſum fregit, &c.* the Defendant juſtifies, That the Cattle went in through the defect of the Plaintiff's Incloſures. The Plaintiff replies, That the Cattle came in through another Man's Fence into his Ground. The Defendant demurs, for that the Plaintiff doth not aſſign where the Place of the other Cloſe lies, through which the Cattle came. *Windham.* Here is a new Aſſignment, and he anſwers not the Treſpaſs for which the Action is brought, and a new Aſſignment muſt have a new Anſwer. *Stiles p.* 357. *Baker* and *Andrews. Rolls contra.*

The new Aſſignment in this Action is parcel of the Count, and ſhall abate the Writ if it be ill. 1 *Anderſon* 31.

The Defendant pleadeth, That the Place where, *&c.* is called *Whiteacre*, &c. and that it is his Free hold. The Plaintiff replieth, That the Place where is called *Blackacre, alius quam in barra.* The Defendant rejoins, That the Acre mentioned in the Bar, and the Acre mentioned in the Replication are one and not divers. It's no Plea: For it is repugnant to ſay that they are both one, when the Plaintiff by his Replication hath affirmed upon Record that it is another. When he ſaith *alius* it cannot be *idem. Cro. Eliz. p.* 355. *Freeſton's* Caſe. The Caſe of 21 *H.* 6. 21. is no Law. The Defendant ſhould have pleaded in bar to the Place newly aſſigned, or Not Guilty. *Ibid. p.* 492. For when the Plaintiff makes a new Aſſignment, this is a Waver of any Treſpaſs alledged in the Bar. By the new Aſſignment the Bar is out of Doors, as if it never had been pleaded. Therefore where the Defendant juſtifies for Damage-Feſant in *Blackacre*; The Plaintiff made a new Aſſignment of the Treſpaſs in *Whiteacre.* The Defendant

fendant juſtifies as ſeizure for an Herriot: yet good, though in Bar he juſtifies for Damage-Feſant, wherein he claims not any Property; and in the Rejoinder he juſtifies for a Herriot. *Cro. Eliz. p.* 589. *Odiham* and *Smith.*

Treſpaſs quare *domum & clauſum fregit.* The Defendant pleads, The Houſe is called *Crable-Houſe*, and one of the Cloſes is *Blackacre*, and the other is *Whiteacre*, and pleads that they are his Free-hold, and ſo juſtifies. The Plaintiff ſaith, That the Treſpaſs done was in the Houſe called *Crable-Houſe*, and in *Blackacre*, which are his Free-hold, *abſque hoc* that they are the Free-hold of the Defendant; and that the Treſpaſs was done in another Place containing twenty Acres *alias quam Whiteacre*, &c. Demurrer; for it was ſaid, when the Plaintiff makes a new Aſſignment, ſo that the Defendant hath not agreed to him, and hit every Parcel intended in the Declaration, this new Aſſignment is as a new Declaration, to which the Defendant ſhall have a new Anſwer in all, and is a Waver of the former Pleading in all; wherefore he ought to have omitted his Traverſe. But *per Cur.* in regard the Defendant hath hit ſome of the Places wherein the Plaintiff intended the Treſpaſs, and pleaded thereto, the Plaintiff may well anſwer to that part, and the Defendant ſhall have no other anſwer. As if the Defendant had hit one Place, and had confeſſed the Action therein, the Plaintiff needed not make any Anſwer thereto, and the Defendant ſhall not wave his Anſwer, and anſwer to all *de novo*. *Cro. Eliz. p.* 812. *Prettyman* and *Lawrence.*

The Plaintiff in Treſpaſs makes a new Aſſignment, the Defendant may not take Iſſue on the Place newly aſſigned being *una & ead.* but he ſhall plead to the Treſpaſs. *More No.* 641.

If the Plaintiff makes a new Aſſignment, the Defendant ſhall make a new Juſtification if he will. *More No.* 713. in the Caſe of *Odiam* and *Smith*. *Vide ante.*

If a Declaration be general, *quare clauſum fregit*, and doth not expreſs what Cloſe, there the Defendant may mention the Treſpaſs at another day, and put the Plaintiff to a new Aſſignment: But if he ſay, *quare clauſum vocat' Dale fregit, &c.* there the Concluſion *quæ eſt ead. tranſgreſſio* will not help. *Mod. Rep.* 89.

Though the new Aſſignment is more large than the Declaration, yet it's good. For in Treſpaſs Damages only are to be recovered. *Aliter* in Ejectment. *Winch Rep.* 65. *Avis* and *Jenney.*

Where the Plaintiff ought to make a new Aſſignment, and what ſhall be a good Aſſignment and what not.

Until the Defendant gives a Name to the Place where the Treſpaſs was done, the Plaintiff need not alledge a new Aſſignment. *Dier* 23. *Pl.* 147. Inaſmuch as the Defendant hath not varied from the Meaning of the Plaintiff, if he doth not give a Name certain to the ſix Acres, as to ſay the Place where, *&c.* is ſix Acres in *D.* called *Green-Mead*, &c.

If the Plaintiff in New Aſſignment gives a ſpecial Name to the Place, and alſo aſſigns Buttalls, he ought to prove both. *Dier* 161. *Pl.* 46. *Sanders*'s Caſe.

The new Aſſignment in Treſpaſs was, *quod clauſum fregit in una acra terræ ſive Prati jacen' in quodam Campo vocat'*, &c. The Defendant pleads *Non Culp.* It is naught for the Uncertainty. For the uncertainty of Land or Meadow, and being without any Buttals or Name of the Acre, the

the Plaintiff was Nonſuit. *Dier* 264. *Pl.* 39. *And.* 2 *p.* 103. 2 *Cro.* 594. 3 *Cro.* 355, 492.

Treſpaſs *in Domo.* The new Aſſignment may be in a Stable or Barn: But if the Declaration had been of a Cloſe, and the new Aſſignment of a Barn, it had not been good. 2 *Leon.* 184, 185: *Hore* and *Wridlesworth.* The Aſſignment ought to be warranted by the Declaration, and ſo doth this; for *Domus eſt nomen collectivum*, and contains many Buildings, Barns, *&c.*

Treſpaſs *quare averia ſua cepit apud Kymb.* and chaſed them, *&c.* The Defendant juſtifies in ſuch a Cloſe for Damage-Feſant. The Plaintiff ſhews, That the Place where was another Cloſe, *&c.* and good: For the Plaintiff may make a new Aſſignment in this, as well as in a *quare clauſum fregit. Cro. Jac.* 141. *Batt* verſus *Bradly.*

Treſpaſs for breaking his Cloſe. The Defendant ſaith the Treſpaſs was in ſix Acres of Land in *D.* and that thoſe ſix Acres were his Free-hold. The Plaintiff may reply it is his Free-hold, and not the Free-hold of the Defendant. If the Plaintiff had ſix Acres in *D.* and the Defendant had ſix Acres in *D.* the Defendant cannot give in Evidence that this Treſpaſs was done in his ſix Acres. *Dier* 23. *Pl.* 147. *Bro. Treſp.* 112. 27 *H.* 8. 7: But by his Plea it ſhall be intended that his Meaning refers to the ſix Acres of the Plaintiff, and not to his own Land.

In Treſpaſs for breaking his Cloſe, the Defendant pleads a Bar at large to make the Plaintiff aſſign the Place in certain, *&c.* The Plaintiff thereupon alledgeth, That the Place where he complaineth is ſuch, *&c.* and ſhews in certain, another than that wherein the Defendant juſtifies. The Defendant averrs, That the one and the other are all one, and known by one Name and the other. The Plaintiff demurs. Judgment *pro Quer.* Be-

cauſe that upon ſuch ſpecial Aſſignment it ſhall be taken meerly another than that in which the Defendant juſtifies, inſomuch as the Plaintiff in ſuch a Caſe cannot maintain it upon his Evidence given: If the Defendant had pleaded Not Guilty to this new Aſſignment, that the Treſpaſs was done in the Place in which the Defendant juſtifies, although it be known by the one Name and the other, and that the Plaintiff hath good Title to it, becauſe that by his ſpecial Aſſignment, ſaying, That it is another than that in which the Defendant juſtifies, he ſhall never after ſay that it is the ſame in this Plea; for it is meerly contrary to his ſpecial Aſſignment. *Popham's Rep.* 109. *Fennor's* Caſe.

In the new Aſſignment the Place aſſigned is not traverſable. *Hob.* 16.

In the new Aſſignment he alledged the Treſpaſs to be in an Houſe called the Kitchin, and in his Garden, and in one Cloſe called the Court. The Defendant, as to the Force, &c. and all beſides the Intration, pleads Not Guilty. And as to his Entry into the Court, and Kitchin, and Tenements aforeſaid of the new Aſſignment, he pleads, &c. This is good enough, though he hath not pleaded to all the Cloſes; for he hath juſtified in the Tenements aforeſaid of the new Aſſignment. *Hutton p.* 127. *Laſhbrook's* Caſe.

The Plaintiff ſuppoſed the Treſpaſs to be done in the breaking of his Houſe and Cloſe in ſuch a Town. The Defendant juſtifies in an Houſe and Cloſe in the ſame Town, and ſhews which, to put the Plaintiff to his new Agnment: to which the Plaintiff replied, That the Houſe and Cloſe of which he complains is ſuch an Houſe, and gives it a ſpecial Name. The Defendant demurs, and adjudged againſt the Plaintiff, For by the Bar the Plaintiff is bound to make a ſpecial Demonſtration in what Meſſuage and what Cloſe. *Popham p.* 109.

Pr ſidem

Preſidents of new Aſſignments and Pleadings.

De Meſſuag. De Meſſuag. & Terris. 2 Rep. 5, 6, 18. Co. Entr. 272.

De uno Curtelag. 3 Br. 474.

De pecia Terræ vocat. Co. Entr. 648.

Common Bar in two Acres *vocat. Blackacre.* New 2 *Rep.* 6. a.

Aſſignment 7 Selions *del terre* in *Southfield. Winch. Entr.* 1076.

Novel Aſſignment, un peice de terre noſme Houſecorner *in B. parva giſant en* Trenilborough-Field, *cont.* nine Acres. *Winch Entr. p.* 1080.

Non culp. ad partem; Common Bar *ad reſidue, & nova aſſignatio inde.* 3 Br. 400, 474.

Nova aſſignatio poſt placitum ſpeciale ad totum, &c. & non culp. ad novam aſſignat. Ra. Entr. 579, 626, 641.

Def. in placito ad novam aſſignat. dicit quod locus vocatur tam per unum nomen quam per aliud jacen. in K. prad. 3 Br. 418.

Pur meaſe debruſe, le common bar, un meſe noſme le Swann *in* Cornhill. *Novel Aſſignment un meaſe noſme le* Dog & Duck *in* Cornhill. Winch. Entr. p. 1096.

Non culp. al novel Aſſignment. Ra. Entr. 632. Co. Entr. 289.

Bar ſpecial al novel Aſſignment. Ra. Entr. 608. Hern. 707.

Colour al novel Aſſignment. 1 Browne p. 380.

Judicium pro Quer. in parte loci de novo Aſſign. ubi Def. eſt inventus non culp. al reſidue. Jud. 163. 132.

Bar to the new Aſſignment muſt be either Not Guilty, or ſpecially.

Loci

Loci in quibus in Bars, Replic. & Abuttals.

———*Pecia terræ vocat.* a Wharf, *continens tot Pedes in longitudine, & tot in latitudine.* Ra. Entr. 661.

Plowd. Com. 21. *Colthirſt* and *Bejuſhin.*

Vide plura as to this in *Townſend*'s Tables.

Before I come to treat of Bars in Treſpaſs in particular, it will be neceſſary to ſay ſomething of Colour in Treſpaſs, and unfold the Notion of it, and where it ſhall be given, and where not.

COLOUR.

Colour in pleading ſignifies in the Common Law a Probable Plea, but in Truth Falſe; and is to the end to draw the Tryal of this Cauſe from the Jury to the Judges. *Terms del Ley, Bro. Tit. Colour.* 64, 140.

Want of Colour is but Form, and therefore muſt be alledged on Demurrer. 3 *Leon. p.* 267.

In Treſpaſs *entre ſur Diſſeiſin, Aſſize, &c.* Colour ought to be given. Becauſe the Law (which favours certainty) to the end that either the Court ſhall adjudge upon it if the Plaintiff demur, or that a certain iſſue may be taken upon a Point certain, requires the Defendant, when he pleads ſuch ſpecial Plea, that this notwithſtanding the Plaintiff may have Right, the Defendant ſhall give Colour to the Plaintiff, to the end that his Plea ſhall not amount to the general Iſſue, and ſo to leave all the matter at large to the Jurors, which would be full of Multiplicity. As

Aſſize is brought againſt *H. H.* (who was infeoft by *J. S.*) if he be compelled to plead to the point of the Aſſize, *i. e. nul tort, nul diſſeiſin,* there

there all the matter will be put in the Mouths of the *Lay-gents*. If *H. H.* plead in bar of the Aſſize, that *J. S.* was ſeized and infeoft him, by force of which he enter'd, and demand Judgment if the Aſſize lies againſt him. This Plea is not good, for it amounts to the general Iſſue. Therefore that the Matter may be pleaded before the Judges, or be upon a point certain, the uſual way is, for the Defendant to give Colour (as the *Spaniard* ſaith, *Tell a Ly and find the Truth.*) And the moſt common Colour is this, When the Defendant pleads *J. S.* infeoft him, he pleads over and ſaith, and that the Plaintiff claiming by Colour of a Deed of Feofment made by the Feoffor before the Feofment made to him, where no Right paſſed by the Deed upon which he entered, *&c.* 10 *Rep.* 90. a. *Doct.* and *Stud. cap.* 53. *fo.* 160. 19 *H.* 6. 21. So

So in Action of Treſpaſs for taking away the Plaintiff's Beaſts, the Defendant pleads, That before the Plaintiff had any thing in them, he himſelf was poſſeſſed of them as of his own proper Goods, and delivered them to *A. B.* to deliver to him again when, *&c.* and that *A. B.* gave them to the Plaintiff, and the Plaintiff ſuppoſing them to be *A. B.*'s took them of him as his Gift, and the Defendant took them from the Plaintiff, whereupon he hath brought the Action. It's a good Colour. *Doct.* and *Stud. l.* 2. *c.* 43. 10 *Rep. Dr. Leyfield's* Caſe.

In Treſpaſs, Colour of Poſſeſſion given by the Defendant to the Plaintiff ſufficeth; becauſe the Declaration is general upon a Suppoſal without any Title put in Certain, and for this it ſufficeth to anſwer a Suppoſal with a Colour of Poſſeſſion only. But in Actions of Trover, and all other Actions where the Plaintiff makes Title to the thing demanded, or to a thing for which he demands Damages,

mages, there the Defendant ought to make a better Title to himſelf, and to traverſe the Title of the Plaintiff, *quod nota. Yelv. p.* 174. *Preiſtlye's* Caſe.

As in Trover of Goods, the Defendant makes Title to them *paramount*, and that he delivered them to the Plaintiff to keep, by which the Plaintiff was poſſeſſed, and that the Defendant, as was lawful for him, took them as his own Goods. Adjudged no Plea, becauſe he only anſwers the Title of the Plaintiff with a Colour of Poſſeſſion; but doth not confeſs, nor avoid, nor traverſe the Title of the Plaintiff to the goods; but gives Colour of Poſſeſſion without Right or Property.

In Treſpaſs where the Defendant pleads a Title to Lands or Goods, he muſt (after his own Title ſet forth) ſhew Colour; that is, feign ſome Shew of Title in the Plaintiff, elſe his Plea totally diveſting the Plaintiff of Title would amount to no more than the Not Guilty.

Treſpaſs for entring into his Houſe, and taking and carrying away his Goods. The Defendant pleads, Before the Treſpaſs was ſuppoſed, one *A.* was poſſeſſed of the ſaid Goods, and the Goods being in the Houſe of the Plaintiff, the ſaid *A.* ſold them to the Defendant. by force whereof he was poſſeſſed, and ſo poſſeſſed came to the Plaintiff's Houſe, *&c.* and by Licence of the Plaintiff's Wife enterd, *&c.* It's no Plea; there is no Colour given to the Plaintiff, but the Sale is good. 3 *Leon. p.* 266. *Taylor* and Fiſher.

What ſhall be ſaid to be a good Colour.

1. It ought to be a doubt in the Lay Gent. 19 *H.* 6. 21.

2. It ought to have continuance.

3. It

3. It ought to maintain the Nature of the Action.

4. It ought to be given by the firſt Conveyance, The Defendant derived to himſelf by divers mean Conveyances, and gives Colour to the Plaintiff by one laſt named in the Conveyance. It's ill. 2 *Rolls Rep.* 140. *Allen's* Caſe. 10 *Rep.* 91 b. Dr. *Leyfield's* Caſe.

5. Colour ought to be a good Colour of Title, and yet not a Title. Treſpaſs for taking and carrying away an hundred Load of Wood. The Defendant juſtifies, for that *J. S.* was poſſeſſed of them *ut de bonis propriis*, and the Plaintiff claiming them by Colour of a Deed of Gift afterwards made, took them; and the Defendant re-took them. Adjudged on demurrer to be no good Colour; becauſe the Colour given to the Plaintiff is a good Title for the Plaintiff, and confeſſeth the Intereſt in him. For Colour muſt not be a Title but Colour of Title: as a Deed of Leaſe for Life, becauſe it hath not Livery. Grant of a Reverſion without Attornment is not good; But a Deed of Goods and Chattels without other Act or Ceremony is good. And a Colour by a Leaſe for Years or Letters Patents is not good, becauſe they make a good Title in the Plaintiff. *Cro. Jac. p.* 122. *Radford* and *Harbyn.*

6. Colour by Poſſeſſion in Law is good.

The Plaintiff claiming *colore feoffamenti*, where it ought to be *colore chartis feoffamenti.*

Where Colour ſhall be given.

Colour ſhall not be given but upon a Plea in Bar.

When the Defendant pleads ſuch ſpecial Plea, that notwithſtanding it the Plaintiff may have Right, Colour ſhall be given. *Vide prius.*

He

He ought to give Colour to the Plaintiff of ſuch Poſſeſſion upon which to ground an Action.

If a Man plead Deſcent in Bar, the Defendant ought to give Colour; for this doth not bind the Poſſeſſion but the Right. 10 *Rep.* 90. b.

Plea ſhall not be good without Colour when the Property is alledged in a Perſon certain; becauſe it is a Proof that no Property was to the Plaintiff. 10 *Rep.* 91. a. 32 *H.* 6. 1.

If a Servant juſtify, as *J. S.* was ſeized of Lands, and let them to *J. D.* and he as Servant to *J. D.* enter'd, he ought to give Colour. *Vide* 10 *Rep.* 89, 90. *Cro. Eliz.* 76. *Becket's* Caſe.

J. S. brought Treſpaſs for taking away his Goods in *S.* The Defendant alledgeth, *D. fuit Parſon de S.* and he as his Servant took theſe Goods as the Goods of his Maſter, and the Plaintiff would have taken theſe Goods from him, and he would not ſuffer him. This was held an ill Plea, becauſe the Defendant did not acknowledge Poſſeſſion in the Plaintiff, nor Property in him at any time of the ſaid Goods. 2 *H.* 4. 7. a.

The Defendant juſtifies, for that *J. S.* was ſeized in Fee, and lett to *B.* for Years; and he as Servant to B. juſtifies the Damage-Feſant; and it was demur'd, becauſe he gives not any Colour. *Per Cur.* for this Cauſe the Plea is not good, it being ſhewed for Cauſe; otherwiſe not, for it is but Form. And a Difference was taken where the Defendant juſtifies as Servant to another, whoſe Free-hold it is, without ſhewing any Title, and where he ſhews a Title, as in this caſe is done. *Cro. Jac.* 229. *Patrickſon* and *Barton. Cro. Eliz. p.* 76.

Where

Where Colour ſhall not be given.

Where the Matter of the Plea bars the Plaintiff of the Right, no Colour ſhall be given although he had Right; for it would be in vain to give Colour of Right, and to bar him if he had Right.) As if a collateral Warranty be pleaded in a real Action, or if a Fine be pleaded, or Statute, *&c.* Otherwiſe where he pleads a Deſcent; for this doth not bar the Right but the Poſſeſſion.

If an Eſtoppel be pleaded, he ſhall not give Colour.

If a Man convey to himſelf a Title by Act of Parliament, he ſhall not give Colour.

He who claims by Sale in a Market *overt*, ſhall not give Colour if he pleads generally. But if he pleads that *J. S.* was poſſeſſed as of his own Goods, and ſold them in a Market *overt*; there he ſhall give Colour becauſe he confeſſeth no Intereſt in the Plaintiff. 22 *H.* 6. 1.

If the Defendant pleads that the Goods were waved *infra manerium*, he ſhall not give Colour.

So if he juſtify for a Wreck.

If the Defendant claims Title by the Plaintiff himſelf, he ſhall not give Colour. In Treſpaſs the Defendant ſaith, That the Place where, *&c.* is an Acre of Land whereof the Plaintiff was ſeized, and thereof being ſeized infeoft *J. S.* whoſe Eſtate he hath. This is not a good Plea; for there wants Colour. But a Feofment of the Plain-Plaintiff immediately, is a good Plea. 10 *H.* 7. 14. b.

When the Defendant juſtifies for Tithes, he ſhall not give Colour. For to whomſoever the Lands belong, the Tithes belong to the Parſon.

If the Defendant juſtify as his Free-hold, and conveys Title to his Maſter.

If

If the Defendant juſtifies as a Servant.

When the Defendant pleads to the Writ or the Action of the Writ, no Colour ſhall be given.

Where a Plea is an abſolute Bar of Property no Colour ſhall be given.

Colour ſhall not be given to a Stranger who infeofed the Plaintiff.

Colour ſhall not be given by a Poſſeſſion determined; ſo where it appears in the Pleadings that the Poſſeſſion is determined, but ſhall be given by an Eſtate defeated.

Where the Defendant binds the Right of the Plaintiff by Feofment with Warranty, Releaſe, Fine, Recovery, Diſſeiſin and Re-entry, and the like, there needs not any Colour.

He which lays no Property in the thing, but takes it as a Diſtreſs, and the like, ſhall not give Colour.

Colour ſhall not be given but upon a Plea in Bar.

Colour ſhall not be given but by him by whom you commence your Title, and not by a Mean in the Conveyance. *Vide ſupra.*

Plead, That the Defendant delivers the Trees to the Plaintiff for to re-deliver them to him when he ſhould require it, and after the Plaintiff removes the Trees from the Place, *&c.* and the Defendant carries them away. It's no Plea; becauſe in Treſpaſs there is no Colour to puniſh him, for that he had not any Intereſt againſt him, and no Property againſt him. *Aliter* of meſne Bailment. 5 *H.* 7. 18. a.

Preſidents of Colours.

Plowd. fo. 22, 29.

Dier 112. a.

Colour Twice given. *Plowd. Com.* 164, 165. *Hill* and *Graunge.*

Et

Et Sparſim in Preſidents.

Colour *ſuper Titulo per Feofment.* Ra. Entr. 629, 641. Co. Entr. 652.

Simil. ſur Title per Deſcent. Ra. Entr. 631, 632, 633.

Simil. ſur Fine lavyed. Co. Entr. 673.

Simil. per Deviſe. Ra. Entr. 656, 658. Co. Entr. 652, 657.

Tranſ. Title per Feoffament. Et Color quod Quer. clam. per chartam dimiſſionis, &c. & ne dit, fact ante Feoffament. 1 Co. 108. bis.

Colour in Treſpaſs *de Averijt abductis.* Ra. Entr. 629.

Quod Def. fuit Executor & fuit poſſeſſ. de bonis. Et Quer. colore priore teſtamenti ſeiſivit bona quæ Def. cepit, &c. Ra. Entr. 641.

De bonis capt. Bar quod Def. ea emebat, & Quer. pretendens donum bonorum ante vendition. abſtuliſſe voluit a Def. quod Def. non permiſit. Ra. Entr. 676.

CAP. XIII.

Of General Rules of Pleading, and of Pleas amounting to the General Iſſue.

AND now I come to my chiefly intended and moſt important Deſign, to treat of the Pleadings in Treſpaſs, which take up a great part of our Law-Books, and which are generally extraordinary nice and curious, eſpecially the Learning of Traverſes. Having therefore handled the three Preliminaries (as I uſe to call them) the Common Bar, the Novel Aſſignment, and Colour, and ſhewed the true Notion and Nature of them, I ſhall in the next place ſet down ſome General Rules and Caſes of Pleadings in Treſpaſs, and after particular Bars and Juſtifications, and then go on to the Nature and Order of Traverſes with Replications of *Injuria ſua propria*, and other Matters relating to Pleadings; as ſhewing Title, when the Plea amounts to the general Iſſue, *&c.*

General Rules of Pleading to Actions of Treſpaſs Vi & Armis.

1. *Whenſoever a Man cannot have Advantage of the Special Matter by way of Pleading, there he ſhall take Advantage of it in the Evidence.* As the Rule of Law is, That a Man cannot juſtify in the killing or Death of a Man; therefore in that caſe he ſhall be received to give the Special Matter in Evidence, as that it was *ſe defendendo*, or in Defence of his Houſe in the Night againſt Thieves and Robbers, and the like.

2. By

2. By Stat. 7 *Jac. c.* 5. in any Action on the Caſe, Treſpaſs, Battery or Falſe Impriſonment againſt any Juſtice of the Peace, Bailiff, Mayor of City or Town Corporate, Headborough, Tithing-Man, Conſtable, Collector of Subſidy in any of his Majeſty's Courts in *Weſtminſter*, or elſewhere, concerning any thing by any of them, by reaſon of any of their Offices aforeſaid, and all others in their Aid and Aſſiſtance, or by their Commandment, *&c.* they may plead the General Iſſue, and give the Special Matter for their Excuſe or Juſtification in Evidence.

3. *If the Defendant doth not anſwer or traverſe to every Treſpaſs laid in the Declaration, the Plaintiff ſhall have Judgment.* For the Plaintiff's Declaration muſt be anſwered fully. *Siderf. p.* 440. *Webb* and *Bell.* When one anſwers not the Vendition, though he anſwers all the reſt of the Declaration, it's no Plea. 1 *Keb.* 204. So a Treſpaſs *Equis, Bobus, Vaccis*, he anſwers to the Treſpaſs *Equis & Vaccis*, but ſaith nothing to the *Bobus*. 2 *Keb.* 219. *Catesby* and *Daniel.* In Treſpaſs for taking, chaſing and impounding, the Defendant ſaith nothing to the chaſing. It's a good Exception on Demurrer. 2 *Keb.* 601. the Juſtification of Diſtreſs by *quoad reſiduum tranſgreſſionis*, is not ſufficient without anſwering to the feeding and treading the Graſs. 2 *Keb.* 631. *Webb* and *Bell.* *Vide poſtea Tit. Juſtification.*

4. *Regularly, whenever a Man doth any thing by force of a Warrant or Authority, he muſt plead it.* Vide infra ſub Tit. Juſtification.

5. *He which makes a Special Juſtification, ought to make it of ſuch a thing which is not juſti-*

fiable to be done, unleſs for ſome ſpecial Cauſe; otherwiſe it will amount to the general Iſſue. Treſpaſs for Timber, The Defendant ſaith, That a Stranger was poſſeſſed, and gives this to him, *abſq; hoc* that he was culpable to the Plaintiff. This was void and but the General Iſſue. So in Trover (for this Rule ſhould be well obſerved.) The Defendant pleads the taking at *L.* by force of a Cuſtom, which amounts to a Gift in Law, and after juſtifies the Converſion in *D.* This is no more than *Non Culp.* for it is as much as if he had ſaid, That an Eſtranger gives them to him at *L.* by force of which he converted them at *D.* this is but a Converſion of his own Goods, and therefore amounts but to *Non Culp.* 1 *Rolls Rep. p.* 1. *Hill* and *Hawkes.*

6. If any Man have Intereſt to a thing by the Grant or Aſſent of another, and the Party which hath ſuch Intereſt may not have the principal thing without doing ſome other thing, he may do the ſaid other thing and juſtify it. *Or, a Man may always juſtify the neceſſary Circumſtance, where he had Title to the Principal Thing.* If a Man grant to me all his Trees growing in his Wood, I may cut them and carry them over his Land; and tho' his Graſs be trodden down with the Carriage, he ſhall not have Treſpaſs for this: For the Trees are ſuch things that if they are not carried with Carts, he cannot have them, nor make his Profit of them. But if one ſell all his Fiſhes in his Pond, and the Vendee digs a Trench, and lets the Water all out, Treſpaſs lies: For he may take the Fiſh by Nets or other Engines. But for coming on the Banks he may juſtify. *Plowd. Com.* 16. a. *Reniger* and *Fogoſſa.*

7. If

7. If he which Pleads in Bar is preſcribed to a certain time, he ought to ſhew the Day of his Act certainly. As if one plead in Bar by Entry for *Mortmaine*, he ought to ſhew the certain time of his Entry; ſo that it may appear to be within the Year. So if one juſtify for Common between *Lammas* and *Candlemas*, he ought to ſhew certainly the time of his uſing it, ſo as it may appear to be done within the time. So he who juſtifies by Licence, Warrant, or Authority, always ought to ſhew the time certain of his Juſtification. *Plowd. Com.* 33. b. *Colthirſt* and *Bejuſhen.*

8. By Stat. 23 *H.* 8. *c.* 5. in an Action of Treſpaſs, or other Suit, againſt any Perſon for taking any Diſtreſs or other Act doing by force of the Commiſſion of Sewers, the Defendant ſhall make Avowry, Conuſance or Juſtification by Authority of the Commiſſion of Sewers, *&c.* And the Plaintiff ſhall reply *de injuria ſua propria, &c. Co. Lit.* 283.

9. In Treſpaſs of breaking his Cloſe, upon Not Guilty he cannot give in Evidence that the Beaſts came through the Plaintiff's Hedge, which he ought to keep; neither can he upon the General Iſſue juſtify by Reaſon of a Rent-Charge, Common, or the like. *Co. Lit.* 282. 3.

Of ſwearing his Plea.

10. If an Action of *faux Impriſonment* is laid in *London*, and the Defendant pleads that he was *tempore quo, &c.* A Juſtice of the Peace of the County of *Cavan* in *Ireland*, and on Oath there made before him by *J. S.* that the Plaintiff had ſtolen two of his Sheep, the Defendant did com-

mit the Plaintiff to Priſon, *quæ eſt eadem Impriſonment, &c. abſq; hoc.* that he is culpable in *London, ſeu alibi extra Comit. Cavan.* In this caſe the Defendant muſt ſwear his Plea, becauſe it's a Foreign Plea, and ouſteth of Jurisdiction. An Action of Treſpaſs is laid in *London*, the Defendant cannot plead a Releaſe made to him in *Surry*, unleſs he will ſwear his Plea to be true; becauſe the making of the Releaſe being a Tranſitory Act, may be pleaded where the Action is laid: But where the Matter of a Foreign Bar is Local, it is not accounted a Foreign Bar; becauſe the Defendant traverſeth the Fact in that County where the Plaintiff hath laid it.

11. The Plea being ill in in part, is ill in the whole, although he doth juſtify ſome part well: For an entire Plea may not be good in part and ill in part; for that ſuch entire Plea is not diviſible. 1 *Sanders Rep.* 27, 28. Earl of *Mancheſter* verſ. *Vale. Cro. Eliz.* 268, 330, 434. *Cro. Jac.* 27.

12. The Defendant pleads in Treſpaſs, *Quia le Plaintiff obſtruxit viam cum januis prædict.* he broke them. The pleading by a *Quia* is adjudged ill; it's not poſitively averred. So [*eo quod*] is adjudged ill pleading. *Cro. Eliz.* 441. *Gooday* and *Michael. Dier* 257. b. 1 *Sanders* 117. cited in *Cutler's* Caſe.

13. If a Man Juſtify Impriſonment as Sheriff, and ſaith nothing as to the *vi & armis*, yet the Plea is good. For *vi & armis* is but Matter of Form, and aided by Stat. 27 *Eliz. c.* 5. of General Demurrers. 1 *Sanders p.* 81. *Law* and *King.*

14. It's

14. It's no Plea in Treſpaſs that another Treſpaſs is depending. *Cro. Eliz.* 326. *Quære,*

15. In ſome Caſes a Man may alledge Special Matter, and conclude with a Demurrer. As in Treſpaſs by *J. S.* for the taking of his Horſe, the Defendant pleads, That he himſelf was poſſeſt of the Horſe, until he was by one *J. S.* diſpoſſeſt, who gave him to the Plaintiff. The Plaintiff replies, That *J. S.* named in the Bar, and *J. S.* the Plaintiff were all one Perſon, and not divers: And to the Plea pleaded by the Defendant in the manner, he demurs in Law. And the Court held the Plea and Demurrer good: For without the Matter alledged he could not demur. *Co. Lit.* 72.

In Treſpaſs for breaking his Cloſe, *&c.* The Defendant *quoad vi & armis*, pleads *non culp.* without ſaying *de hoc ponit ſe ſuper patriam*, and pleads over to the Treſpaſs. The Plaintiff demurs generally. *Per Cur.* it's Matter of Form, and the Plaintiff ſhall not have Advantage of it without ſhewing it. *Siderf.* 216. *Thacker* and *How.*

Pleas amounting to the General Iſſue, and where a Man pleads the General Iſſue, and where he muſt plead Specially.

Where the Defendant pleads a Title to Lands or Goods, he muſt (after his own Title ſet forth) ſhew Colour, *i. e.* feign ſome Shew of Title in the Plaintiff; elſe his Plea totally diveſting the Plaintiff of Title, would amount to no more than Not Guilty.

Vide prius ſub Titulo General Rules of Pleading in Treſpaſs. *Regula* 5.

In Treſpaſs for entring into Land, the Defendant pleads his Entry by a Leaſe for Years: This amounts to no more than not Guilty, and the Plaintiff may demur upon it. *Stiles Rep.* 355. *Jaques* Caſe.

Treſpaſs for Entry and pulling down Poſts of a Fiſhing. The Defendant pleads he was Lord of a Manor wherein was the River *Avon*, in which they had a Fiſhing, and becauſe the Plaintiff ſet up Poſts there, he pulled them down. This amounts to the General Iſſue, unleſs there had been a Traverſe *abſque hoc* that he pulled down the Poſts in the Plaintiff's Fiſhing. 2 *Keb.* 57. *Hely* and *Raymond.*

If the Plea in Bar doth not anſwer the Declaration, as in Trover, the Defendant juſtifieth Diſtreſs for Toll, which is no Converſion, then he that demurs need ſhew no Cauſe of his Demurrer, though the Plea do amount to the General Iſſue. But where the Bar doth anſwer the Declaration, as in Ejectment, or in Treſpaſs, the Defendant pleads his Free-hold, and gives no Colour, or otherwiſe pleads informally, in this caſe the Demurrer muſt be Special. 2 *Keb.* 57. *Skevington* againſt *Reynolds.*

Treſpaſs for entring his Cloſe and taking Corn. The Defendant juſtifies Generally as Servant to the Parſon, and that the Corn was Tithes ſevered from the nine Parts. The Plaintiff demurs, becauſe this amounts to the General Iſſue, Not Guilty. But *per Cur.* this is a good Plea; for as to the breaking the Cloſe, ſuch Matter cannot be given in Evidence, and the Juſtification goes to both. But if the Action had been only for the Corn, this would be but the General Iſſue: As in Treſpaſs for an Horſe, it's no Juſtification to ſay the Horſe is the Horſe of *J. S.* and that he as Servant took him; for if the Property be not in the Plaintiff

tiff, the Defendant may as well in the Treſpaſs as Trover be found Not Guilty. 2 *Keb.* 44, 71. *Minors* againſt *Hogſon.*

One brought an Action *de Parco fracto*, and declared on the Breach of a Pound, and taking out of Beaſts. As to the taking out of Beaſts, the Defendant pleads Not Guilty; and as to the breaking the Pound, That he was Lord of the Soil on which the Pound ſtood, and that he brake off the Lock, and put on a Lock of his own. *Per Hob.* he ought to plead the General Iſſue; for in Verity this is not any Breach of the Pound, except the Beaſt come out of it. *Winch. Rep. p.* 80.

The Defendant juſtifies the taking as of his own Cattle. This in a Bar amounts to Not Guilty. So in Treſpaſs for taking Trees, *&c.* The Defendants plead they were our Trees, growing on our own Soil, and we cut them, *&c.* And the Plea was challenged; wherefore the Defendant pleaded over without that that he took the Trees of the Plaintiff. 1 *Leon.* 178. 22 *Ed.* 3. 18.

In Aſſault and Battery, *Non Culp.* is a good Iſſue if the Defendant committed no Battery at all. But regularly, if the Defendant hath Cauſe of Juſtification or Excuſe, then can he not plead Not Guilty; for then upon the Evidence it ſhall be found againſt him, for that he confeſſeth the Battery, and upon that Iſſue cannot juſtify it; but he muſt plead the Special Matter, and confeſs and juſtify the Battery.

If in Battery the Defendant may juſtify the ſame to be done of the Plaintiff's own Aſſault; he muſt plead it ſpecially, and muſt not plead the General Iſſue. *Co. Lit.* 208. *Vide* more of this before in *Tit. General Rules of Pleading in Treſpaſs.* And further obſerve Briefly, in theſe Caſes a Man may plead Not Guilty:

1. When

1. When the thing ſuppoſed to be done for Matter of Fact is not true.

2. When the Matter of which the Plaintiff complains is not a Treſpaſs, but ſome other Offence, and ſome other Action but not (Treſpaſs) is given for it.

3. When the Lands or Goods for which the Action is brought is mine and not the Plaintiff's, *Vide* 5 *Rep.* 85. *Co. Lit.* 282, 283.

When Liberty is given by an Act of Parliament ſo to plead, and give the ſpecial Matter in Evidence, as in caſe of Officers. *Vide prius, & 21 Jac. c.* 19. in caſe of Treſpaſs brought againſt Commiſſioners of Bankrupt, they may plead Not Guilty, and give the Special Matter in Evidence.

If it be out of the Caſes aforeſaid, and the Defendant have Matter of Juſtification or Excuſe to plead, he muſt be ſure to Plead it ſpecially.

If one have Corn upon another's Land, and therefore enters to take it, and the Owner of the Land ſue him, he muſt juſtify and not plead Not Guilty. 5 *Rep.* 85. So if he Juſtifies by reaſon of a Rent-Charge.

If he put his Cattle into Land by Agreement with the Plaintiff, he muſt plead it Specially. *Old Book of Entries*, 596, 605. And yet,

If he be to juſtify by reaſon of a Title to Land, he may plead Not Guilty, and give the Special Matter in Evidence. *Co. Lit.* 283. 22 *H.* 6. 3.

A Man is allowed to plead Specially, where he may plead the General Iſſue, and give the Special Matter in Evidence.

1. When a Defendant by his Plea doth admit ſome Colour of Action to be in the Plaintiff, but ſheweth ſome Special Matter of Fact to avoid it. 10 *Rep.* 88. Dr. *Leyfield's* Caſe. *Vide* 1 *Regula Placitandi* 303, 304.

2. When

2. When there is a Matter of Law pleaded that is not proper for a Jury, then though it amount to a Not Guilty or the general Iſſue, yet there cannot for that Cauſe be a Demurrer to the Plea, becauſe it would perplex the Jury. A Releaſe is a Bar in Law, yet may be given in Evidence; it may be pleaded without giving any formal Colour, for that it implieth the Plaintiff might have his Action elſe; and the Defendant need not intruſt a Jury with Matter of Law, but refer it to the Conſideration of the Court. In Treſpaſs for taking away the Goods, the Defendant pleads he bought them in Market *overt*. This is a good Plea, becauſe it acknowledgeth the Plaintiff hath a good Cauſe of Action, if it had not been for the Property's being by act of Law altered and veſted in the Defendant; and a diſcharge in Law from the Action, is moſt natural and proper to lay before the Court, and repreſent it as a Matter of Law, and not leave it to the Lay-Gents to enquire of.

Juſtification, Excuſe by Involuntary Treſpaſs.

Treſpaſs *pedibus ambulando.* Bar *quod Def. carriatus fuit ſur terre del Quer. per force & Violence des auters, & nemy voluntarie.* It's a good Plea. *Stiles Rep. p.* 65. *Smith* and *Stone.*

If a Man drive my Cattle into the Land of another, he is a Treſpaſſor and not I that own the Cattle. *Stiles ibid. Vide ſupra.*

Treſpaſs *quare domum & clauſum fregit*, and taking away a Gelding. The Defendant pleads, That he for fear of his Life and Wounding of twelve armed Men, who threatned to kill him if he did not the Fact, went into the Houſe of the Plaintiff and took the Gelding. This is no Plea to juſtify the Treſpaſs. I may not do a Treſpaſs

to

to one for fear of the Threatnings of another. *Stiles Rep.* 72. *Gilbert* and *Stone*. *Allen Rep.* 35. *meſme Caſe*. He pleaded, That for the ſaid Menace he entred the ſaid Houſe, and returned immediately through the ſame Cloſe, *quæ eſt ead. Tranſ.* Its no Plea, neither is the Plea good for the Manner, becauſe he did not ſhew that the way to the Houſe was through the Cloſe. *Ibid.*

Vide ſupra. p. 1.

Treſpaſs for chaſing Sheep. The Defendant pleads they were Treſpaſſing on his Land, and he with a little Dog chaſed them out, and as ſoon as the Sheep were out of the Land, he called in his Dog. A good Plea. So if a Man be driving Beaſts to the Pound, and they eſcape into *A.* and he preſently retakes them, it's *dampnum ſine injuria*. A Man may juſtify chaſing of Sheep for taking one of his own. *Jennings* and *Mayrſtone*'s Caſe. A Man cuts Thorns, and they fall into another Man's Land, and in Treſpaſs he juſtified it. Yet *per Cur.* notwithſtanding this Juſtification Treſpaſs lies, becauſe he did not plead he did his beſt Endeavour to hinder their falling there. *Popham* at the End, 161. *Miller* and *Fawdry*.

A Man drives Goods through a Town, and one of them goes into another Man's Houſe, he may follow it.

If Deer be out of a Forreſt, the Owner of the Land where they are may hunt them.

I may purſue a Fox into another Man's Land. *Popham* 162.

Vide plura Sparſim per tot.

If my Cattle in driving catch a Mouthful of Corn, it's no Treſpaſs. *Bro. Treſp.* 321, 351.

Def. plede quod averia Quer. contra voluntatem Def. intraver. in loco in quo, &c. cum Averiis ſuis. Tompſ. 402.

By

By Stat. 21 *Jac. c.* 16. it is enacted, That in all Actions of Treſpaſs *quare clauſum fregit*, wherein the Defendant ſhall diſclaim in his Plea to make any Title to the Land in which the Treſpaſs was done by Negligence or Involuntarily, and do render or offer amends ſufficient for the Treſpaſs before the Action brought, whereupon or upon ſome of which the Plaintiff ſhall be forced, and if the ſaid Iſſue ſhall be found for the Defendant, or the Plaintiff be Nonſuited, ſuch Plaintiff ſhall be clearly barred from the ſaid Action or Actions, and all other Suits concerning the ſame.

CAP.

CAP. XIV.

Of Juſtification concerning Inheritances and th' Appurtenances; as Entry into Land, Digging Soil, Cutting Trees, &c. *by way of Excuſe, as for Publick Good, Neceſſity, Liberty* per *Law, for the Execution of Law,* &c.

A Man may juſtify ſometimes that what he did was for the Publick Good, or in caſe of Neceſſity, or that he had Allowance by Law for what he did, or for the Execution of Law, or the like. In treating whereof the Learning and Equity even of our Common Law will appear.

For Publick Good.

One may juſtify the entring into another Man's Land in purſuit of a Badger (which is a noxious Creature) but he may not juſtify the entring into the Land of another to find one. But if a Badger be earthed he may not dig for him. 2 *Bulſtr.* 60, 61, 62. 2 *Rolls Abr.* 558. *Hedges* and *Mynne.* And ſo of other noxious Vermin; ſo Foxes, Otters, but not Hares. If a Man Hawk in my Land without leave, I may have this Action.

Treſpaſs *quare Clauſum fregit, & pedibus ambulando,* &c. the Defendant makes a ſpecial Juſtification, that he did enter into the Plaintiff's Cloſe to ſearch for Sheep that were ſtolen from him. *Per Rolls* it's an ill Bar. For all that he hath alledged by way of Juſtification, is but matter of Private Profit to himſelf, and not for the Publick Good: for

for he went not thither to find or apprehend the Felon. *Stiles Rep.* 165. *Toplady* againſt *Staley.*

The Defendant juſtifies, Apple-Trees, *&c. in pomario ſuo creſcentia furata eradicata & aſportata fuerunt per M.* and the common Fame was, he took them to the Plaintiff's Houſe; whereupon he went to the Plaintiff's Houſe to ſearch for them, and there found them, *&c.* It's no Plea. The Difference is between Felony and Treſpaſs. If *J. S.* takes my Horſe and brings him to the Land of *J. D.* it is not lawful for me to enter into the Land to take him. *Aliter* if *J. S.* felonioufly ſteal my Horſe (but if *J.* S. take my Horſe into his own Stable, I may juſtify my entry to retake him.) *Quære* if Entry and Search be lawful on Common Fame only. *Dier* 235. 2 *Rolls Rep.* 55. *Higgins* and *Andrews.*

If Cattle are Stolen and put into my Ground, I may take them Damage-Feſant, or bring Action of Treſpaſs againſt the Owner; and the Owner cannot take them away without my Licence. *Stiles* 167. *Toplady's* Caſe.

In Treſpaſs *quare Clauſum fregit, & Herbam,* &c. the Defendant may not juſtify for hunting a Fox. 2 *Rolls Abr.* 558. *Lach.* 120. *contra. vide Bulſtr.* 2. 661.

One may juſtify the making Bulwarks in time of War, and pulling down an Houſe that burns. *Dier* 36, 40.

But it is not lawful for a Man to do a Wrong to another, although it be for his Profit; as if I ſee my Neighbour's Beaſts in another Man's Soil doing damage-Feſant, I may not enter and drive them out. *Dier fo.* 36. *Pl.* 38, 39. *vide ſupra.*

Treſpaſs for breaking Soil and ſetting up Hurdles. Juſtify by Market or Fair, or in breaking Soil to amend the Pipes, to put in Stakes for Fiſhermen

Fiſhermen to dry their Nets, as in Kent. *Siderf.* p. 291. *Popham* and *Woolcott.* 2 *Bulſtr.* 61.

In Treſpaſs for digging his Soil, the Defendant juſtifies he was ſeized of ſeven Acres, wherein was a Cole-Mine, and the Servants of the Defendant working *pro Bono Publico*, the Water aroſe, and they digged a Trench in the Plaintiff's Soil to convey away the Water. It's not good. A Man cannot remove a Nuſance in his own Ground, to the Prejudice of another. *Aliter* of an ancient Water-Courſe. 2 *Keb.* 13, 58. *Howard*'s Caſe.

Juſtificat' quod Def. ſimul cum aliis Inhabitantibus Villæ prædict' per eorum communem aſſenſum freger' & proſternaver' domum quer' tempore conflagrationis. 2 Browne p. 175.

For Neceſſity.

If a Man cuts down Trees and they fall into another Man's Land, he may enter and take them. 2 *Bulſtr.* 61, 62. 13 *H.* 8. 16.

If Trees grow in my Hedge, and the Fruit of ſuch Trees hang over your Land, and falls into it, I may juſtify the gathering them. *Latch* 120. *Miller*'s Caſe.

When a Man doth a lawful Act, and of neceſſity another thing happens which he could not prevent, no Action of Treſpaſs lies. As for Example, a Man may juſtify the retaking his Beaſts out of another Man's Land after they eſcape as in driving them to the Pound. A Man in Ploughing his Land, his Beaſts are unruly, and as he ploughed his Land (he turning upon the Had-land) one of the Horſes took a Mouthful of Corn; this may be juſtified. *Latch* 119, 120. *Millen* and *Fawdry.*

A Man may follow his Hawk or his Hound into another Man's Land. 2 *Bulſtr.* 61. 2 *Rolls Abr.* 567.

If

If a Butcher drive Sheep in the Streets, and they run into the Houſe of a Stranger, he may juſtifie the taking them out of the Houſe, *per Dodderige.*

If a Man had a Way over my Land for his Beaſts to paſs, if the Beaſts bite the Graſs by Morſels, this is juſtifiable. 2 *Roll. Abr.* 566. *aliter*, if they ſtay long there.

For Recreation by Preſcription.

Treſpaſs for breaking his Cloſe, the Defendant preſcribes that all the Inhabitants of a Village, time out of memory, had uſed to dance there, *Omni tempore Anni ad Libitum ſuum*, for their Recreation, and ſo juſtify'd the dancing there: Iſſue upon the Preſcription, and Verdict for the Defendant; and to ſave his Coſts, the Plaintiff moved in Arreſt of Judgment, that this Preſcription to dance in the Freehold of another, and ſpoil his Graſs, was void, eſpecially as this is laid, *Omni tempore Anni*, and not at ſeaſonable times. Alſo it is ill laid in the Inhabitants, that altho' they may preſcribe in Eaſments, as 6 *Rep. Gateward's* Caſe, and ſome other Books are, yet they ought to be Eaſments of Neceſſity, as Church-ways, *&c.* and not for Pleaſure only, as this Caſe is. 2. If it be good, it ought to be laid by way of Cuſtom of the Will, and not by Preſcription in the Perſon. But *per Cur.* this is a good Cuſtom, and it is neceſſary for Inhabitants to have their Recreation. As to the 2d. perhaps tho' this had been ill upon demurrer, yet iſſue being taken of it, and found by Verdict, it is good, and Judgment for the Defendant. 1 *Levinz* 176. *Abbott* and *Weekley.*

If a Man be driving Cattle to the Pound, and they eſcape into another Man's Land againſt my Will, and I preſently fetch them out, no Action lies for this againſt me. *Bro. Treſp.* 335.

If one be aſſaulted and like to be killed, and he fly over my Ground to ſave his life, I may not ſue him for this. 37 *H.* 6. 37.

Liberty to enter, &c. by Common-Law.

A Man may enter into a Common Inn or Tavern and juſtifie it. 8 *Rep.* 6 *Carpenter's* Caſe.

The Lord may enter to Diſtrain, *&c.* Vid. *Puis.*

He in the Reverſion may enter to ſee if waſte be done if the Houſe Door be open; ſo he that hath the Reverſion deviſed to him to ſell. *Plowd. Manxell's* Caſe. 9 *H.* 6. *fo.* 19. 13. a.

Executor may enter into the Land of the Teſtator to take Timber, and ſo may the Vendee of an Executor. 2 *Rolls Abr.* 564.

If a thing be feloniouſly ſtollen from me, I may upon freſh Suit enter. *Vid. Prius* in *Higgins* and *Andrews.* 8 *Rep.* 6 *Carpenter's* Caſe; but if my Trees are ſtollen, and put into the Houſe of *J. S.* I may not enter to take them.

A Man holds an Houſe at Will, and he bring Goods there, and then the Leſſor puts him out, he ſhall have a reaſonable time to take away his Goods. *Cok. Lit.* 56.

The Executor ſhall have a reaſonable time to fetch his Goods out of the Houſe where they are at the Teſtator's death. 1 *Brownl.* 224.

The Miniſters and Churchwardens may enter another's Land in their perambulation. *New Book of Entries* 652.

If one is bound to pay me Money on an obligation in my Dwelling-houſe, he may come and tender it there; *aliter* in another Man's Houſe. *Plo.* 71.

For

For the Execution of Law.

Beaſts are impounded in an open place, which had a Gate open; if the Sheriff comes to make Replevin, and the Owner with Arrows, *&c.* hinders him, he may break the Cloſe and enter, and make Replevin. 20 *H.* 6. 28.

The Sheriff may enter into an Houſe to purſue a Felon. *Dier* 36. *Pl.* 40. 5 *Rep. Semaine's* Caſe.

The Plaintiff in Replevin may juſtifie the entry into the Defendant's Cloſe, to ſhew the Beaſts to the Sheriff. 3 *H.* 6. 37. b.

Treſpaſs for breaking open the Doors, and entering into the Houſe. Defendant pleads he was Under-ſheriff, and a *Fieri facias* came to him, and he made his Warrant to the Bailiff, who *oſtio tunc aperto* entred to make Execution, and continued there till the Plaintiff ſhut the Door, and impriſoned them in his own Houſe for 4 hours; and the Defendant hearing this, broke open the Door to free his Bailiffs. It's a good Plea, for they enterd lawfully, and when the Plaintiff ſhut the Door againſt them then began the Tort, which the Sheriff may redreſs. 2 *Rolls. Rep.* 137. *White* and *Wiltſhire.*

Treſpaſs for entring into his Houſe. Defendant juſtifies by Warrant of a Juſtice, and doth not ſhew it; which *per Cur.* is needleſs, unleſs the Action be againſt the immediate Officer. The Replevin was *de injuria ſua propria*, which is not proper here, it being matter of intereſt, and not barely of excuſe, but *per Cur.* after Verdict it is well enough. 2 *Keb.* 266. *Lambert* and *Kellum.*

Treſpaſs of breaking an Houſe, and taking a Cup, *&c.* Defendant juſtifies by Plaint and Judg-

ment in *Wakefield*, and Precept of Execution, to which the Plaintiff demurred, becauſe, 1. It's ſaid *quædam curia*, not ſaying what. 2. It is *taliter proceſſum* till Judgment. 3. It is ſaid a Court *coram Seneſchallo & Sectatoribus*, which cannot be a Court Baron. 4. It's ſaid the Defendant *ut ballivus Seneſchalli* took. 5. The Precept is retornable *ad proximam Seſſion*, and the retorn is half a Year after. 6. The Execution is at ſuch a place *in Paroch. pred.* and doth not ſay *infra Juriſdictionem*. *Per Cur.* all the Exceptions are mamaterial. 2 *Keb.* 844. *Gamble* and *Forreſt*.

If ones Sheep be ſtollen, he may go into any Man's Ground where he doth ſuſpect the Sheep are, to ſee the Sheep whether they be his or not. *More* 389.

Note, Tho' I do a good act, and intend it well, and it is for my Neighbours profit, yet if what I do be a Tort in Law it will not excuſe me. In Treſpaſs for taking Tithes, Defendant ſaith the Tithes were ſevered from the 9 Parts, and were in jeopardy of being eaten by Cattle, therefore the Defendant carried them to the Plaintiffs own Barn, it was adjudged no Plea (*durus Sermo.*) 15 *H.* 7. 17. vid. *plus ſupra*. *Dier* 36. b.

Of Juſtification by proſternation of a Nuſance, vid. ſupra, cap. 4. *and* Sparſim in aliis locis.

Treſpaſs for erecting his Cloſe, and caſting down his Hurdles, fixt to his Freehold. Defendant pleads that the place where is *communis platea*, in ſuch a Village and a place of Market there, and preſcribes to place Stalls there, and for that the Hurdles were there fixt he caſt them down, it ſeems the Action lies not, for the Place where is *communis platea*, and erecting of Hurdles there a Nuſance, which any Man may throw down; but

but becauſe this did not appear upon the Declarat' but by the Plea, which is ill, and the Defendant had not pleaded and relied upon it but upon other Matter, which is not ſufficiently pleaded, they gave Judgment *pro Quer.* 1 *Levin.* 184. *Popham* and *Woolcott.*

Juſtification as Bailiff or Servant.

I ſhall next proceed to ſpeak of Juſtifications by Title or Intereſt to Lands and Tenements, and incidents thereto, as Tithes, Trees, *&c.*

But firſt I ſhall ſay ſomething about Juſtification by a Servant or Bailiff.

Defendant juſtified as Bailiff to *J. S.* Plaintiff replies, that the Defendant took his Cattle of his own wrong, *abſq; hoc* that he is Bailiff to *J. S. Per Cur.* if one hath good cauſe to diſtrain my Cattle, and a Stranger of his own head takes my Goods not as Servant or Bailiff to another, in treſpaſs he cannot excuſe himſelf by ſaying he did it as Servant or Bailiff; but if one diſtrains as Bailiff, tho' in truth he is not one, if he in whoſe Right he juſtifies aſſent to it, he ſhall not be puniſhed as a Treſpaſſer, for this aſſent ſhall have relation to the time of the diſtreſs taken. 2 *Lev.* 196. *vid.* 216.

There is a diverſity where a Defendant juſtifies as Servant to another whoſe Freehold it is without ſhewing any Title, and where he ſhews a Title as in the Caſe of *Patrickſon* and *Barton. Vid. ſupra tit. Colour.*

Juſtificatio per Servant qui pledes title de ſon Maſter. Winch. Entr. *p.* 1118.

Juſtification as a Servant of a Parſon for Tithes. Winch. Entr. *p.* 1120.

Def' pledes quod quedam C. fuit ſeiſe de loco, &c. & ipſe per mandatum pred. C. fecit le treſpaſſe. Tompſ. 319.

Juſtificatio ut Serviens in libero tenemento Magiſtri. Co. Entr. 644.

Unus in jure proprio, & alter ut Serviens. Ra. Entr. 648.

Juſtif. ut Serviens al Seignior del common. 1 Sanders, *p.* 25.

CAP.

CAP. XV.

Of Bars and Juſtifications in Treſpaſs by Title or upon Title.

By ſon Franktenement.

QUod locus in quo eſt liberum tenement um. Def. Replic. quod eſt liberum tenement. quer'. Ra. Entr. 647. bis. Cok. Entr. 675. Aſht. 436. *& non def. & traverſe.* Tompſ. 318.

Similis Bar per Servien'.

Per 2. quod locus eſt liberum tenementum eorum, & alter juſtificat ut Serviens.

Quod eſt liberum tenementum def. & uxor' in jure uxor'.

Bar per liberum tenementum quer' confeſſe le franktenement & pleads un demiſe devant. def. riens ad en les tenements, & aſſignment del leaſe al querenti. Winch. Entr. *p.* 1106, 1107.

In Treſpaſs the Def. juſtifies under Sir *Tho. H.* as Servant; the Plaintiff replies, it's his Soil, and traverſeth *abſq*; *hoc* that it's the Freehold of the Defendant and Iſſue, and ſpecial Verdict on a Conveyance. 2 *Keb.* 784. *Croſſing* and *Skidmore.*

In Treſpaſs, if the Defendant will ſay it is his Freehold, the Plaintiff may ſay that it is Freehold, and traverſe without that, that it is the Freehold of the other, this is a good Iſſue, tho' perhaps uncertain. *Plowd. Com. p.* 52. a.

By Grant del Roy.

Rex poſt inquiſit' ſur Felo de ſe conceſſit terras Def. Ra. Entr. 608. Plowd. 254.

Inquiſitio poſt mortem attincti in Parliament' & Grant de ceo. Ra. Entr. 633.

Title is made to the Goods by Seizure, for that K. *P.* and Queen *Mary*, by Letters Patents enrolled in Chancery *dederunt & conceſſerunt ville de L.* Liberty of a Market, *&c.* and ſhews a ſpecial cauſe of Seizure as an Officer there, it's erroneous, becauſe he ſaith not *ſub ſigillo magno confect. Crok. Eliz.* 117. *Kingdon* and *Barne.*

Treſpaſs for taking and impounding his Beaſts until he paid 3 *l.* 7 *s.* Defendant pleads a Suit in the County Court brought by *J. S.* againſt the now Plaintiff, where the Defendant pleaded *Liberum tenementum* of the Earl of *Arundel*, and juſtifies the taking damage feſant in the Freehold of the Earl, to which the then Plaintiff pleaded in bar of the Conuſance, that the Earl ought to make the Fences, and for default of reparations the Beaſt eſcaped, and upon this Iſſue was taken that the Fences were in good repair, and the Jury found them out of repair *& aſſidunt damna*, &c. and Judgment and a Precept in nature of a *Scire facias* under the Seal of the Sheriff, the Defendant being Bailiff to Levy, *&c. per Cur.* the Judgment is void *& coram non judice*, becauſe after Freehold pleaded the County Court had no Jurisdiction, for Freehold cannot be tried without Writ. It was objected, that the Franktenement was not Tried there, but it aroſe upon collateral Matter (*ſcil.*) if the Fences were in repair, but *per Cur.* after Freehold pleaded, they had no power to proceed in the Cauſe, neither directly nor collaterally, and Judgment *pro Quer.* 3 *Lev.* 203. *Cannon* and *Smallwood.*

By

By Fine.

Quod T. *ſeiſitus levavit finem al* I. *qui demiſit def. Repl. quod* H. *fuit ſeiſitus quouſq;* T. *diſſeiſivit eum & levavit poſſeſſionem* H. *reintravit infra 5 annos & obiit de quo deſcendebat al* W. *qui demiſit quer' Repl. Traverſe le diſſeiſin.* Cok. Entr. 673.

Quod quer' ſeiſitus levavit finem W. *&* G. *uxor' ejus qui feoffaverunt Def. Repl. quod finis fuit levatus ad uſum &* W. *uxor' ejus ſuper ſeparales conditiones non performat' Repl. quod quer' relaxavit omnes conditiones pro cond' fract'.* 2 Cok. Rep. 6.

By Tenancy en Common.

Def. fiſt title in Communi cum quer' per quod fecit tranſ. Tompſ. 388.

Vid. ſupra, Title Tenant Common, *Treſp. pro Traverſe tenement. in Com.*

By Jointenancy.

Per Coheirs, up. b. 168.

Pro feno un verſus auter. 1 Browne 371.

By Feoffment.

Quod J. *ſeiſitus feoffavit* R. *& al. &* R. *feoffavit Def. de parte. Novel. aſſignment & non cul.* Ra. Entr. 641.

If a Man plead a Feoffment, he ought to traverſe all Treſpaſſes done before. *Hobart,* p. 104.

If the Defendant will plead a deſcent to him, and the Plaintiff ſaith that after this the Defendant enfeoffs

enfeoffs him, and the Defendant ſaith this Feoffment was upon Condition for the breach whereof he entred, this is a departure from the Bar. 10 *Br.* 21. *cited in Plowd.* 7. b.

Def. en treſpaſſe claimes per feoffment & done colour al quer. Tomp. 341.

By Tenancy en Tayle.

Quod A. *ſeiſitus convenit ſtare ſeiſitus ad uſus in Tallio & terre devenere Def.* Ra. Entr. 659.

Eſtate Tayle & Common recovery pleaded. Cok. Entr. 654.

Pleading ſeiſin in Tayle, and ſhew not how Heir in Tail. *Plowd. Com.* 43. *Wymbiſh* and *Talbois.*

Bar. per 2 *Def. quod* R. *ſeiſitus dedit.* J. *in Tayle, remanere* R. *uni Def. in Tayle.* J. *fuit ſeiſitus quouſq;* L. *ipſum diſſeiſivit, qui fecit continuum clameum.* L. *obiit & terre deſcend. filio ſuper cujus poſſeſſionem* J. *reintravit & obiit ſeiſitus ſine herede per quod* R. *unus defend. intravit & demiſit* W. *alteri Def. & querens clamans colore, &c. ſuper cujus poſſeſſionem* W. *in jure proprio &* R. *ut ſerviens reintravit. Repl. quod* R. *ſeiſit. fuit & feoffavit* L. *qui obiit & meſuag' deſcend. filio qui dimiſit quer. qui fuit poſſeſſe quouſq; domum fregerunt, abſq; hoc quod* L. *diſſeiſivit* J. 1 Brown 374.

By Deſcent.

Quod pater Def. fuit ſeiſitus de terris que deſcend. Def. Ra. Entr. 631.

Un. deſcent uxor. Def. Ra. Entr. 632.

Deſcent des terres en Gavelkind. Ra. Entr. 632.

Quod

Quod pater Def. fuit ſeiſe, & quod Def. poſt mortem ejus intravit & fecit tranſ. Repl. quod quer. fuit ſeiſe devant & traverſe le dying ſeiſed del pere de Def. Tompſ. 337.

By Recovery.

Per recovery en Formedon. 1 Brown, 374.

Per recuperationem in brevi de dote ſuper grand cape. 2 Brown, 287.

By Diſſeiſin.

Plea, liberum tenementum. Repl. per diſſeiſin. Rejoinder per Maintenance de Franktenement & traverſe le diſſeiſin. 1 Brown, 373.

Quod locus in quo eſt liberum tenementum J. & al. & Def. ut ſerviens cepit equum damn' faciend' Repl. quod Def. fuit ſeiſit' quouſq; Def. diſſeiſivit eum, & quer' reintravit. Repl. per maintenance del franktenement & traverſe le diſſeiſin. Ra. Entr. 647, 648. Cok. Entr. 280. Ra. Entr. 648.

Quod locus in quo eſt liberum tenementum Def. Repl. quod T. ſeiſit' de manerio unde, &c. demiſit quer' pro annis qui fuit poſſeſſionat' quouſq; Def. eum expulit & diſſeivit T. 3 Br. 467.

By Entry pur condition fact:]

Juſtif. quod Def. intravit in terras pur condition broken virtute conditionis in Indentura dimiſſion' ſpecif. Tompſ. 310.

Quod Def. intravit domum, &c. pur condition infreint ſur morigage. Tompſ. 339. *Repl. mainteyne le narrat & traverſe le peaceable Entry.* Tompſ. 340.

Quod

Quod quer' levavit finem W. & G. *uxor' ejus qui feoffaverunt Def. Repl. quod finis fuit levat' ad uſum* W. *& uxoris ſuper ſeperalibus conditionibus non performat'.* &c. 2 Cok. 6.

By Deviſe.

In Treſpaſs, the Defendant pleads ſuch an one was poſſeſſed of a term for Years, and being ſo poſſeſſed by his laſt Will and Teſtament, deviſed that to the Defendant and died; after whoſe death the Defendant entred, and was poſſeſſed by vertue of the deviſe. It ſeems a good Plea, tho' the Defendant had not expreſly alledged that the Deviſor died poſſeſſed, *&c.* for his Plea implies that, and it is only matter of form. *Winch. rep.* 53.

Quod ſeiſit' demiſit al C. *pro annis qui deviſavit terminum.* Vid. B. Ub. *p.* 196.

If Deviſee pleads he entred for default of Payment of the Rent, he ought to ſhew he entered into the Land by leave of the Executors. *Stiles, rep.* 65. *Matthew* and *Herle.* Vid. *infra.*

By Demiſe *and* Re-entry *for Rent.*

Defendant pleads he was ſeized of the Land in which, *&c.* and Lett it to *A.* rendring Rent, at the Feaſt of *Eaſter*; and if it be Arrear at the ſaid Feaſt, and ten days after, that he might re-enter, and ſaith the Rent was behind, *&c.* whereupon he entered and diſtrained. Demur 1. He ſaith he Lett it to *A.* but ſaith not *virtute cujus* he entred and was poſſeſſed, for it may be the Leſſor did not wave the Poſſeſſion, and then no Rent was due. 2. He ſaith the Rent was behind by the ſpace of ten days, where it ſhould be after the ſpace of ten days. *Crok. Eliz.* 262. *Wood* and *Hamſtead.*

The

The Defendant pleads that *J. S.* demiſed to the Plaintiff *reddendo* Rent; and after by his laſt Will and Teſtament gives the Land to the Defendant, who enters for default of Payment of Rent. He ought to have ſhewed that he entred into the Land by the leave of the Executor. *Stiles p.* 65. *Matthew* and *Herle.*

Per Rolls, If in an Action of Treſpaſs *vi & armis* for entring into Land, the Defendant pleads his entry by Virtue of a Leaſe for Years. This amounts to no more than Not Guilty, and the Plaintiff may demur upon the Plea, and ſhew it for Cauſe of Demurrer. *Stiles Rep. p.* 355. *James* Caſe.

If a Man juſtify by a Demiſe, he ought to ſhew that it continues. 3 *Bulſtr.* 198.

The Defendant ſaith, his Father was ſeized in Fee before the Treſpaſs, and died ſeized, after whoſe Death the Plaintiff entred, and the Defendant re-entred. The Plaintiff replies, True it is, the Father of the Defendant died ſeized; but he ſaith that before this, his Father made a Leaſe to *J. S.* for ten Years to commence after his Death, and that J. S. died Inteſtate, and Adminiſtration was committed to him, and ſo he enter'd and was poſſeſt until, *&c.* The Defendant demurs, becauſe he ſhews not the Letters of Adminiſtration. *Per Cur.* he need not; for he may declare here without ſhewing he was Adminiſtrator. 2 *Rolls Rep.* 430.

If in Treſpaſs the Defendant doth Juſtify by a Leaſe for Years, without ſhewing a Place where the Leaſe is made, it is not amendable. 1 *Leon.* 81.

As to other Preſidents of Copy-hold Titles *vid. Townſend's Tables*, 289. where you are referred to all the old Preſidents.

In

In Treſpaſs the Defendants *ſeparatim dicunt*, That they are ſeverally ſeized of ſeveral Tenements for Life, and that they have accuſtomed to dig the place where for Reparation, and do not aver any want of Repair: Alſo being Copy-holders for Life, they ſhould ſhew the Commencement of their Eſtates. The Court agreed *quod ſeperatim dicunt* is well enough; but the latter Exceptions are fatal being on Demurrer. 2 *Keb.* 766. *Put* verſus *Dany*, &c.

Treſpaſs for Cloſe breaking. The Defendant juſtifies, becauſe it was the Free-hold of J. S. and he enter'd by his Command. The Plaintiff entitles himſelf, becauſe the Place where is Cuſtomary Land, and that J. N. was ſeized in Fee, and died ſeized, which deſcended to two Daughters and Heirs, and were admitted by the Lord, and they demiſed to the Plaintiff. *Per Cur.* the Plaintiff hath not made a good Title; for none may entitle himſelf to any Copy-hold, but he ought to ſhew a grant thereof; therefore he ſaying ſuch an one was ſeized in Fee without ſhewing the Grant thereof was not good. *Cro. Car.* 190. *Shepard's* Caſe. *Vide plura ſub Titulo de Arboribus.*

By Title *des Diſmes & Rectorie.*

Dr. *M.* brought Treſpaſs for three Loads of Oats, *&c.* The Defendant juſtifies becauſe the Place where is parcel of a Copy-hold in *T.* and makes Title to it, and juſtifies for Damage-Feſant. The Plaintiff ſhews that long before the time when, *& præd' tempore quo, &c.* he was Parſon of *T. &c.* and that the Place where is within his Rectory, and that the Defendant lett it to *H.* who enter'd and plowed, *&c.* and ſet out the Corn; and that the Defendant *de injuria ſua propria* took the Oats *præd. tempore quo, &c.* The Defendant

Defendant maintaining his Bar traverſed the Leaſe, and found *pro Quer.* and Judgment for him. It was alledged in Error that he doth not ſay, that at the time of the ſeverance of the Corn he was Parſon (though he might be at the time of the Treſpaſs) and then he makes not a ſufficient Title to them. *Per Cur.* it ſhall be intended that he was Parſon at the time of the Severance; eſpecially the Defendant having admitted that he was Parſon and the Tithes due to him, and making Traverſe to the Leaſe, which was an idle Traverſe; and this *contra* to 35 *H.* 6. *fo.* 48.

As to the References to the old Preſidents, *vide Townſ. Tab.* 290.

Barr de Arboribus.

The Dean and Chapter of *Pauls* brought Treſpaſs againſt J. S. for cutting down great Wood. The Defendant as their Bailiff of a Manor juſtifies, That there was a Park incloſed with Pale time out of memory, and that he cut the Trees for the neceſſary Incloſure of the Park with Pale, and employed it upon this. *Per Cur.* it's a good juſtification; for it belongs to his Office to repair the Park or Buildings; but he may not make new Pales. 12 *H.* 7. 26. cited in *Plowd. Com.* 283. in *Greysbrooke's* Caſe.

Treſpaſs for cutting down four Aſhes in, *&c.* The Defendant pleads *Actio non*, becauſe long time before, *&c.* one J. P. was ſeized in Fee of the Cloſe in which, *&c.* and 3 *Apr.* 21 *Eliz.* by Indenture of the ſame date demiſed to J. C. the ſaid Cloſe, excepting the Wood and Underwood thereon growing, *habend.* &c. and further covenanted with him *quod licitum foret* for the ſaid Leſſees and their Aſſigns, to take upon the Premiſſes neceſſary Fire-bote and Houſe-bote, to be expended

expended upon the Premiſſes, or for Reparation thereof: and juſtifies, as Servant he took the ſaid four Aſhes for neceſſary Houſe-bote to be expended upon the Premiſſes. It's an ill Plea: 1. He juſtifying by force of a Covenant, ought to ſhew the Indenture; for it is the Subſtance of the Title. 2. Becauſe it is not ſhewed that the Maſter expended them for theſe purpoſes. *Cro. Jac.* 291. *Purify* and *Grimes.*

The Defendant pleaded the Place where was Parcel of the Manor of, *&c.* which Manor the Earl of O. lett to *H.* for Years, *exceptis Boſcis, Arboribus, Subboſcis*; but did covenant and agree, that the Leſſee and his Aſſigns might take reaſonable Fire-bote and Hedge-bote *ſuper Premiſſa prædicta. Per. Cur. ſuper Premiſſa* ſhall only extend to the Land lett, and not to the Woods excepted. *Cro. Eliz. p.* 125. *Cage* and *Payton. Aliter* if he had averred there had not been ſufficient on the Land lett.

A Man gives to me all his Trees growing in his Cloſe, and yet he cuts them down, and I carry them away, if he bring Treſpaſs againſt me *quare Arbores ſuas ſuccidit, cepit & aſportavit*, &c. I may plead as to the cutting down *Non Culp.* and juſtify for the reſidue. *Dier* 305. 27. 33 *H.* 6. 11, 12.

Treſpaſs with Cattle and breaking down Hedges. The Defendant juſtifies by a Reſervation in a Demiſe to cut up and carry away Trees, *&c. præd' W. M. reparan' & emenden' ſepes ubi Arbores ille ſuccid. eſſent*, &c. The Plaintiff demurs *pro his cauſis*, (viz.) *quod in placito prædict' non allegatur quod ſepes & fovere præd' fuer' reparat' & implet' ſecundum conceſſion' agreamentum & licentiam præd. acetiam quod non verificatur quod præd' proſtratio ſepium ex cauſa præd' eſt ead' unde præd' E. ſuperius narravit quod ſecundum*

cundum formam placitandi verificare debuit. H: Pollexſen. *Vide plura* as to Preſidents. *Townſ. Tab.* 290, 291.

By Herriot.

Def. juſtif. ſeizure de Bove pro Herriot Cuſtome. 1 Browne p. 382.

Vide Reference to old Preſidents of Juſtification for Herriot Cuſtom and Service. *Townſ. Tab.* 284.

Bar per Herriot Placita gen. & ſpecialia, p. 607.

By Diſtreſs for Suit.

He took the Beaſts of the Plow, and ſaith only *contra Leges & Statuta,* but recites them not. *Per Cur.* it's well enough. But the Plaintiff doth not aver that there were alſo other Beaſts. *Dier* 312. 2 *Keb.* 289. *Porphery* and *Legingham.* But he need not ſay there is ſufficient Diſtreſs *præter,* &c. for it ſhall come on the other part to ſhew there was not. *Siderf. p.* 348.

For Common, *vide infra.*

Treſpaſs *quare clauſum fregit,* and put in his Beaſts, *& ramos Arborum ipſius Gulielmi* (Quær.) *nuper ibid. creſcentes ſuccidit & aſportavit.* The Defendant as to putting in his Beaſts ſaith, That the Place where is Parcel of the Manor of *H.* and that within this Manor is a Cuſtom that it ſhall be lawful for the Lord to have Common *in terris omnium tenentium ſuorum pro vita vel annorum,* lying freſh, and that the Plaintiff was his Leſſee for Years of theſe Lands in which the Treſpaſs is ſuppoſed. The Plaintiff demurs. As to the cutting down the Trees he ſaith, That he made a

Leaſe to the Plaintiff excepting *Arboribus Manerij & Boſci*, and ſo juſtifies. The Plaintiff confeſſeth the Exception; but ſaith, That the Leſſor in the Leaſe *conceſſit quod liberum eſſet* for the Leſſee *ſuccidere & capere* the Loppings and Shreddings of theſe Trees. Upon this Replication the Defendant Demurs. As to the firſt Point, *per Cur.* it's a void Cuſtom and againſt Law, that the Leſſor ſhould have Common againſt his own Demiſe. As to the ſecond, *Creſcentes* may refer to Loppings, in which the Leſſee had Intereſt, it being indifferent: but it was doubted, If the Leſſor except the Trees, and grant to the Leſſee to cut down the Loppings, and the Leſſor after cut down the Trees, whether the Leſſee ſhall have Treſpaſs. The Court adviſed the Leſſee to releaſe his Damages as to this part, and to take Judgment for the other point. *Palmer* 211. *White* and *Sayer*.

For Toll.

Treſpaſs for taking a Buſhel of Oatmeal. The Defendant pleads to all, except one Quart, Not Guilty, and as to that juſtifies for Toll in the Market of *Penſance* (*viz.*) one Quart out of every twenty Gallons brought to the ſaid Market to expoſe to Sale; and makes Title to the Market and Toll by Grant of one who had it by Preſcription. The Plaintiff replies, That before the Grantor had any thing in the Market Queen *Elizabeth* was ſeized of it, and by her Letters Patents reciting that King *Richard* I. and King *John* had granted to the Borough of *Helſton* in *Cornwall*, that it ſhould be *liber Bargus*, and quit *de Thelonio*, Pontage, Paſſage, Laſtage, Sallage and Stallage through all the County of *Cornwall*, incorporated the ſaid Borough and preſerved its Privileges; and the ſhews he was born within, and a free Burgeſs of

Helſton

Helſton, and ſo exempt. The Plaintiff rejoins, That the Burgeſſes of *Helſton* had always paid Toll. The Plaintiff demurs generally, becauſe this Toll is claimed by Preſcription, and therefore may not be diſcharged by the Grant of the Kings *Richard* and *John*, which are within time of Memory. The Court doubted whether this Toll be within the Word Sallage, or any other particular Word of the Diſcharge: but they were of Opinion that the Charter of Queen *Elizabeth* does not diſcharge the Plaintiff; *ergo nil cap. per Bill.* Sir *T. Jones* 118. *Hill* and *Prior*.

Treſpaſs for taking of four Buſhels of Corn at four ſeveral days (*viz.*) two in the Market-Place at *Lanceſton*, and two others in the Houſe of J. S. The Defendant as to all *præter* ſixteen Pints, pleads Not Guilty, and as to them *Actio non*, and juſtifies, as Servant to the Mayor and Commonalty of *Lanceſton*, and at their Command, and ſhews that *Lanceſton* is an ancient Borough, *&c.* and time out of memory had a Market every *Saturday* in the Week, and preſcribes to take a Pint of every Buſhel of Corn of every Perſon (not being a Burgeſs, or otherwiſe exempted) expoſed to Sale in the ſaid Market *nomine Tolnet.* and that the Plaintiff had expoſed twelve Buſhels at one Market and four at another (he not being a Burgeſs nor exempt) and that he (*prout* Servant) took the ſaid 16 Pints at the ſaid two Markets, *i. e.* twelve Pints for the twelve Buſhels, *&c.* The Plaintiff demurrs, becauſe the Caption in the ſeveral Places mentioned in the Declaration are not anſwered ſeverally, that ſo it may appear whether the Pints were taken in the Market or out of it. *Per Cur.* the Plea is good: It ſufficeth to anſwer to the taking in the Village where it is alledged. Sir *T. Jones* 207. *Specot* and *Carpenter*.

By Diſtreſs for Rent.

The Defendant juſtifies the taking and ſevering of Horſes fixed to a Cart loaden with Corn, for Rent-Service, and good. *Siderf. fo.* 440. *Webb* and *Bell. Vide Cro. Eliz.* 7. *Tunbrig*'s Caſe *contra.* But it is agreed, they may be ſevered, if diſtrained Damage-Feſant. But an Horſe on which a Man is riding may not be diſtrained for Rent, but for Damage-Feſant it may. *Siderf.* 440. 422. But to Treat of Diſtreſſes and what Things are diſtrainable, belongs not properly to this Treatiſe.

The Defendant pleads J. S. was ſeized of the Land in *qua, &c.* in Fee, and demiſed it to the Plaintiff reſerving Rent, with a Clauſe of Re-entry, and after by his Will deviſed the Land to the Defendant, and he re-entred for Non-Payment of Rent, *quæ eſt ead. &c.* The Plaintiff demurs. 1. Becauſe he doth not ſhew that the Leaſe made to the Plaintiff is a Leaſe of the Land in which the Treſpaſs is ſuppoſed to be done. 2. He ſhews not that he did enter into the Land by the leave of the Executor, which he ought to have done; for though the Land were deviſed to him; yet he cannot enter without leave of the Executor. *Stiles Rep. p.* 65. *Matthew* and *Herle.*

The Defendant juſtifies by Diſtreſs for Rent of the Leſſee at Will. The Plaintiff replies, That in *Auguſt*, *i. e.* before the Rent-Day, the Defendant demiſed to the Plaintiff for Years to begin preſently, and that by Virtue thereof he entred. The Defendant rejoins, That there was an Agreement to continue Poſſeſſion by Tenant at Will till *Michaelmas* next, *i. e.* That he ſhould not enter till after the Rent-day, *abſque hoc* that the Plaintiff entered before. *Per Hales*, where the Matter is not traverſable without an Inducement,

ducement, the Inducement is traverſable: It ſeems the Leaſe for Years is a Determination of the Will, becauſe the Leſſe takes notice of it. 3 *Keb.* 207. *Dingſdale* and *Iſles*. And though upon the whole Matter, and by Virtue of the Agreement, it was a Leaſe by Computation from *Auguſt*, and in point of Intereſt but from *Martinmas*; yet as this Caſe is pleaded where the Plaintiff acknowledgeth the Leaſe to commence in Intereſt in *Auguſt*, the Eſtate at Will was determined. *Raym.* 225. *meſme Caſe.*

By Diſtreſs for Damage-Feſant.

Treſpaſs for taking Horſes. The Defendant Juſtifies for Damage-Feſant. The Plaintiff replies, That before the Treſpaſs ſuppoſed, *&c.* he yoaked his Horſes and tied them to the Plough, and the Defendant untied them and took them, *&c.* *Per Cur.* he may well ſever them for Damage-Feſant, *aliter* if it were a Diſtreſs for Rent-Service. *Cro. Eliz.* 7. *Tunbridge's* Caſe. *vide Sid. p.* 440. *Webb* and *Bell's* Caſe *contra*, *vide ſupra.*

Vide de hoc ſparſim.

Treſpaſs for taking his Gelding, *&c.* at *C. in Com. Norf.* and driving and impounding them at a Place unknown, ſo that they may not be Replevied. The Defendant juſtifies Damage-Feſant in his Free-hold, and that he impounded them at *Carrow-Abbey*, within three Miles of the Place where he took them. The Plaintiff replies, That *Carrow-Abby* is within the County of the City of *Norwich*, and not in the County of *Norfolk*. The Defendant demurs, and Judgment *pro Def. in B. C.* By the Statute of *Marl. c.* 4. and 1 *&* 2 *P. & M.* 12. prohibits the driving of the Diſtreſs out of the County upon a Penalty, and he that will take advantage of theſe Statutes ought to do it by way of

Action, and by it to entitle the King to a Fine, and not by way of Bar. Alſo this Replication is ill, and a Departure; for this Action is founded upon Common Law, and by the Replication he will make it good by Statute Law. 3 *Levinz.* 48. *Woodcroft* and *Tompſon.*

In Treſpaſs for taking an Horſe, the Defendant juſtified for that J. A. was poſſeſt of a Cloſe, *&c.* and that the Defendant as his Servant took the Horſe in that Cloſe Damage Feſant. Pl. Demurs, becauſe the Defendant did not ſhew what Title J. A. had to this Cloſe. *Per Cur.* it being in Treſpaſs it is ſufficient to ſay that J. A. was poſſeſſed, becauſe in this Caſe Poſſeſſion is a good Title againſt all others; but it might have been otherwiſe in Replevin, and the Law is plain, That where the Intereſt of the Land is not in Queſtion, a Man may juſtify upon his own Poſſeſſion againſt a Wrong doer. 3 *Mod.* 14. 132. *Langford* and *Webber.*

Bar by Amerciaments.

The Defendant juſtifies that *H.* was ſeized of the Manor of *&c.* and that he had a Leet, *&c.* and that at the Leet the Plaintiff was preſented for having a Pidgeon-Houſe, not being Lord or Parſon, and that he was commanded to ſhut it up, *& deinde habuit notitiam,* and for his refuſal was amerced by the Steward, and for refuſing to pay, the Defendants as Bailiffs to *H.* took the Beaſts. *Per Cur.* the Notice is ſufficient; but the Amerciament ought to have been by the Homage. 2 *Rolls Rep. p.* 3. & *p.* 30. it was adjudged *pro Quer.* for the erecting a Dove-houſe is not a Nuſance preſentable in a Court Leet. *Vide* 5 *Rep.* 104. *contra.*

Treſpaſs

Treſpaſs brought for taking away a Cup till he had paid 20 *s.* The Defendant pleads, That *ad quandam Curiam* he was amerced, and for that the Cup was taken. *Hales*, It doth not appear what Court it is, whether a Court-Baron by Grant or Preſcription, if it be by Grant, then it muſt be *coram Seneſchallo*; if by Preſcription, it may be *coram Seneſchallo*, or *coram Sectatoribus*, or *coram* both. Then it doth not appear that the Houſe where the Treſpaſs was laid, was within the Manor; then he doth not ſay *infra Juriſdiction' Curie. Mod. Rep. p.* 75.

Treſpaſs for taking a Bullock and ſelling it. The Defendant juſtifies, becauſe at the Sheriff's Tourn held *infra Menſem Paſch.* (*viz.*) 18 *Apr.* &c. the Plaintiff was amerced by the Jury for Non-appearance, which was affered by four of the Jury to forty Shillings, and after at the next Seſſions of the Peace (*viz.*) *&c.* it was certified and ratified by the Juſtices, whereupon the Steward made a Warrant to him to levy it, and ſo ſold, *&c.* Demur, 1. Becauſe he doth not alledge that the Tourn was kept *infra menſem poſt Feſtum Paſch' Stat.* 21 *Ed.* 3. *c.* 15. 2. The Amerciament ought to be aſſeſſed by the Court; for it is a Judicial Act, and ſhall be affeered by the Afferers appointed. 3. The Amerciament was levied by the Bailiff by Warrant from the Steward, where by *Stat.* 1 *Ed.* 4. it's appointed, That no Fine or Amerciament in the Tourn ſhall be levied unleſs it be certified at the next Seſſions by Indenture, and enrolled, and by Proceſs made from the Juſtices to the Sheriff. Judgment *pro Quer. Cro. Car.* 276. *Griffith* and *Bidle.*

Treſpaſs for the taking of ſeveral Goods. The Defendant juſtifies for ſeveral Amerciaments aſſeſſed in a Court-Baron, but does not ſhew any Affeerment by the Afferors: Upon which the

Plaintiff demurs generally. And it was adjudged for the Plaintiff by all the Court for this Cauſe. 3 *Levinz.* 19. *Conyers* and *Frank.*

In viſu pleg' Amerciam. Repl. quod non fuit præſentat. Ra. Entr. 606.

Amerciament in Leta pro nocumento. Repl. quod locus in quo eſt extra præcinct. del Leet. Ra. Entr. 606.

Juſtification in Tranſ. per diſtreſs pur un Amerciament in Court-Leet. Tompſ. 311, 346.

Vide Plura as to Amerciaments in Courts-Leet, Hundreds, Tourns. *Townſ. Tab.* 284.

CAP.

CAP. XVI.

Of Juſtification in Treſpaſs by reaſon of Common by Preſcription or Grant.

I Next ſhall ſpeak to Juſtifications by reaſon of Common; but do not intend to handle the Right of Commoning at large, but only give the Caſes and Preſidents ſo far as to direct the manner of Pleadings therein; and the like in the adjoining Title of *Chymin* or a Way.

Of Common.

Bar al novel Aſſign' quant al part Def. confeſ. Judgment per non ſum informat' quant al reſidue Def. Juſtifie per Preſcription pur Common appurtenant & cauſa vicenagij. Repl. ſon tort demeſne & traverſe le preſcription. Rej. & Iſſue ſur le Preſcription. Winch. Entr. p. 1085.

Per Preſcription pur Common & Common de Paſture pur touts avers levant & couchant, &c. Repl. de ſon tort demeſn & traverſe le Preſcription. Winch. Entr. 1089.

Pur imparcat' de vach' ſans reaſonable cauſe. Bar, le lieu en que eſt 500 acres de paſture, & que Seigneur de Manor preſcribe a tener Court-Leet & Court-Baron, & cuſtom a eſlier 4 By-lawmen a Surveyer le Commons; queux 4 ont uſed prender & imparker touts avers de tiels perſons nient ayants common en lieu en que, &c. que fueront troves icy damage-feſant. Et per ceo que la Vach. del Def. fuit en le lieu, &c. Damage-feſant il n'ayant common la ils diſtreyn & impound.

Repl.

Repl. que W. L. *eſteant ſeiſe de meaſon, &c. a que il preſcribes aver Common appurtenant en le lieu en que, &c. il demiſe al Plaintiff pur un ann, qui enter & fuit poſſeſſe & mitt ſa Vach' en lieu, &c. pur uſer ſon Common. Rej. per maintenance del Bar & traverſe de Preſcription en* W. L. *pur aver Common en lieu.* Winch. Entr. 1090.

Bar que le & ſelions giſont en M. field (novelment aſſign') qui pur cheſcuns 2 anns inſemble concurrents uſe d'eſtre emblees ove blades & cheſcun 3 anns a giſer fallow; & que il preſcribe d'aver Common en les 2 Selions cheſcun ann de dits 2 anns concurrents quant le dit M. field fuit emblee puis harveſt, & per tout l'ann quant le dit M. field giſoit fallow, pur que il mitte eins ſes avers prout, &c. Repl. ſon tort demeſn, & traverſe la Preſcription. Rej. Per maintenance del Preſcription & Iſſue. Winch. Entr. 1094.

The Defendant pleads, *Que il eſt impuniable cauſa Vicinagij per Cuſtom del Country.* Winch. Entr. 1111.

Def. plede Diſtreſs pur Damage Feſant per un Leaſe. The Plaintiff preſcribes to have Common. *Winch. Entr. p.* 1113.

Bar al Novel Aſſignment by reaſon of Common. *Repl. per* Leaſe *pur anns. Et Iſſue ſur le Preſcription.* Winch. Entr. 1116.

Preſcript' pro Comunia Paſture in ſeperalibus terris ad ſeperalia tempora pro ſeperalibus averijs & traverſe quod eſt cul. cum equis. Ra. Entr. 579.

Def. ut Rector Eccleſiæ fuit ſeiſitus (in jure Eccleſiæ) de Meſſuag' & terris quibus Communia pertinet per Preſcription. 1 Brown. 371.

Per Common de paſture pertinen. & ad gregem aquand. 1 Browne 370.

The Defendant juſtifies for that he had Common for all his Beaſts Levant and Couchant in the Place, *&c.* by Preſcription, and put in the ſaid

ſaid Cattle *utendo Communia.* Iſſue was on the Preſcription, and found for the Defendant. And Exception was taken, That he doth not averr his Cattle were Levant, *&c.* and ſo no Judgment ought to be given. But *per Cur.* the want of Averment is aided by the Statute of Jeoffails. *Cro. Jac. p.* 44. *Prance* and *Tringer.*

A Commoner may not juſtify by Preſcription to dig Clay and take away the Soil to repair the Houſe. 2 *Rolls Rep.* 308. *Shean* and *Bullen, p.* 344.

Treſpaſs for chaſing the Plaintiff's Hogs. The Defendant juſtifies, That he did hunt them with a Dog, by the Command of his Maſter, becauſe the Plaintiff did put them into his Maſter's Ground to eat Acorns there. The Plaintiff replied he had Common there. The Defendant moved in arreſt of Judgment, becauſe the Plaintiff in his Replication hath not anſwered the Bar; for he preſcribes for common of Paſture, and Pannage is no Paſture, and ſo he hath no Right to the Acorns. But *per Rolls*, if they have cauſe to eat the Graſs, they may eat the Acorns there which are on the Ground. *Stiles Rep.* 213. *Barnſtone* and *Gale.*

In Tranſ. pro ſucciſione arborum & ſubboſci, foditione in ſolo, & terra project. Arborum & ſubboſci aſportatione & herbæ depaſt. cum averijs. Juſtific' per communiam (pro omnibus averijs) paſturæ turbariæ, foditionis terræ ac common eſtover. &c. & fodendo turbas marlerium, &c. & ſuccidend' arbores pro Houſe-bote, Hedge-bote, Fire-bote. 1 *Browne.* 370.

The Defendant Juſtifies in Action for Encloſure, and pleads that he had an Houſe there, and made the Incloſure for the enlargement of his Curtelage. The Plaintiff demurs, and took Exceptions to the Plea;

1. It

1. It is not ſaid to be an ancient Meſſuage. *Per Twiſden*, for that reaſon it is not good. *Windham contra*, being for enlargement of a Curtelage; for the Lord may build a new Houſe for his Herdſmen, and after may enlarge the Curtelage. 2 *Inſt.* 476

2. It is unreaſonable to encloſe two Acres out of three; to which it was anſwered, That the Quantity is to be conſidered with the Quality of the Perſon.

3. It is not averred that ſufficient Common is left, to which *Windham* inclined, *Twiſden contra.* This is to be averred only where Incloſure is for Improvement of Land, not where it is for the enlargement of a Curtelage. But *Trin.* 14 *Car.* 2. The Plea was agreed by all to be ill, becauſe it is not ſaid that the Meſſuage was for his own Habitation, or of his Sheperd; for he might build a great Meſſuage to lett to a Nobleman, who might require a greater Curtelage than the Lord or his Herdſman. Judgment *pro Quer.* 1 *Levinz.* 62. *Nevill* and *Hancerton.*

In Treſpaſs for the breaking his Cloſe, the Defendant juſtifies for Common, and preſcribes in the Bailiffs and Commonalty of *Derby* for the Beaſts of every Freeman of the Village, and upon Traverſe of the Preſcription the Verdict was given for the Defendant. And after it was moved that the Preſcription was not good. *Sed Cur. contra:* and Judgment *quod Quer. nil capiat per billam.*

Treſpaſs for entring his Cloſe and ſpoiling his Graſs *pedibus ambulando*, and taking and driving his Beaſt to Places unknown, *&c.* The Defendant pleads the Place where is a waſte Parcel of his Manor, and that the Beaſts of the Plaintiff were there intermixed with the Beaſts of Strangers, which had not any thing to do there; and becauſe he could not ſever the Beaſts of the Plaintiff from the Stranger's Beaſts, he drove them together to a Pound

Pound within the Waſte to ſever them, and did there ſever them, and drove the Beaſts of the Stranger out of the Waſte, and left the Plaintiff's Beaſts in the Waſte. The Plaintiff *quoad* the Plea of the taking and driving the Beaſts, he preſcribes for Common, and ſaith, That immediately after the Defendant had impounded the Cattle, the Plaintiff requeſted the Defendant to deliver his Beaſts to him, which he refuſed. The Defendant rejoins and maintains his Bar, *abſque hoc* that *die & loco* alledged by the Plaintiff, the Plaintiff immediately after the impounding requeſted the Defendant to deliver them. The Plaintiff demurs. *Per Cur.* 1. The Traverſe in the Rejoinder of the Day and Place is ill and multifarious. 2. The Replication is ill; for he ought to have traverſed the Bar, 1. Either that the Defendant did not leave the Beaſts in the Waſte after the Severance. 2. Or, That he might have ſevered them without impounding them. 3. Or *de injuria ſua propria abſque tali cauſa.* And then the Defendant in this Iſſue ought to have proved the Neceſſity of the Impounding. *Per Cur.* alſo, the Bar is good without alledging a Cuſtom to drive the Common. But where they uſe at a certain time of the Year to drive the Common, they ought to preſcribe. 3 *Levinz.* 41. *Thomas* and *Nichols.*

Treſpaſs for taking and detaining his Beaſts until 5 *l.* paid for their Deliverance. The Defendant juſtifies to have a Drift of Common to ſee if it be not ſurcharged, and that the Beaſts were there ſurcharging the Common for which he took them and detained them until 5 *l.* paid in Satisfaction of the Treſpaſs. The Plaintiff demurs, and it was ſaid, That Preſcription for a Drift of Common doth not warrant the taking a Diſtreſs for it unleſs he had preſcribed to diſtrain alſo. *Cur. contra.* This is a thing of common Right for Preſervation

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of Common, and gave Judgment *pro Quer.* 2 *Levinz.* 87. *Bromfield* and *Teigh.*

The Defendant claims Common in *Trigmore-Moor* for Cattle levant and couchant in *Down-Cloſe.* He ought to aver that theſe Beaſts were levant and couchant upon *Down-Cloſe*, and where he ought to preſcribe. *Popham* 201. *Jenkin* and *Vivian.*

Def. juſtifie come Servant le chaſer des avers pur ceo que fuer' damage-feſant. Plaintiff repl. & preſcribe pur Common, &c. *Def. traverſe le preſcription, & Iſſue ſur ceo.* 1 Sanders 220, 223.

A Man preſcribed, he was ſeized, and uſed to dig Clay in another's Soil to make Pots. It was adjudged void, becauſe whatever Intereſt is claimed in another's Soil muſt be annexed in Property to his own. 2 *Keb.* 290. cited in *Hayward's* Caſe.

The Defendant juſtified for Common. The Plaintiff replies he hath an Houſe adjoining to the Place in which the Defendant juſtifies for Common, and that by Stat. *W.* 2. *c.* 46. he took two Acres to enlarge his Curtelage, not ſaying it was an ancient Houſe. *Per Cur.* he ought to ſay it is an ancient Houſe, and for Habitation alſo, and not only for Pleaſure or convenience, as an Hop-Ground or Park is not within the Statute, he muſt ſay, it is an ancient Houſe, though the Party makes no Preſcription, but only a Privilege, and there needs no Averment that he left ſufficient Common. 1 *Keb.* 283, 314. *Hamerton* and *Nevill.*

The Defendant juſtifies as in his Free-hold Damage-Feſant. The Plaintiff replies, by Preſcription of Common for all Beaſts levant and couchant, *&c.* and avers not that thoſe Beaſts were levant and couchant upon the Land; otherwiſe he hath not ſufficiently entitled himſelf. It's ill upon demurrer,

murrer, but good after a Verdict, by Intendment of *utendo Communia ſua.* Cro. Eliz. 558. Corbiſon *and* Pearſon.

The Defendant preſcribes in the Lord for Common for Beaſts levant and couchant; and juſtifies as Servant to the Lord, and entry to ſee the Cattle that no Damage happen to them, and he *intrando* trod down the Corn. *ibid. Per Cur.* It appears that the Cattle were not the proper Cattle of the Defendant, and he doth not ſay that he put them there, and then he is not Guilty; for a Man may not be Guilty of Treſpaſs with Cattle, unleſs that they are his proper Cattle, or that he actually put them in the Place where. *Per Cur.* the Plea is ill. There is another fault in the Plea, he doth not aver that the Cattle were levant and couchant upon the Manor, and Form of Pleading, *vide Sanders* 1. 27. Earl of *Mancheſter* againſt *Vale.*

When the Defendant rejoins and traverſeth the Preſcription which is found againſt him, the want of Averment, *&c.* are aided by the Statute of *Jeofayles.* 1 *Sanders* 227. *Stennel* and *Hog.*

A Commoner may juſtify for Damage-Feſant, but not have Action of Treſpaſs againſt a Stranger for feeding on Graſs. *Keil. Mich.* 18 *H.* 7. *c.* 2.

Treſpaſs for digging Turf. The Defendant pleads he is ſeized of an ancient Houſe, and preſcribes to have ſo much Turf every Year as two Men may dig in a day as belonging to his Meſſuage. The Plaintiff demurs, becauſe he ſhews not that the Turf was to be burnt in his Houſe, and all Eſtovers ought to be uſed in the Houſe; and as it is laid here it might be ſold, although he claims it as appurtenent to his Houſe; and a Caſe was cited, that a Preſcription to dig Clay in the Soil of another to make Pots is void. But it was anſwered and reſolved, when the thing is uncertain,

tain, as Eſtovers, it ought to be applied to the Houſe to aſcertain it; but here it is certain enough in it ſelf, (*viz.*) ſo much as two Men may dig in a day, and Judgment *pro Quer.* 1 *Levinz.* 231. *Haywood* and *Dunington.*

Treſpaſs by the Lord of a Manor. The Defendant preſcribes as Tenant to have *ſolam paſturam de un cloſe omni tempore anni.* The Court were divided in *C. B.* whether the Preſcription were good to exclude the Lord, but in *B. R.* the Preſcription was adjudged good. 1 *Levinz.* 253. Sir *Hen. North* and *Coe.*

Treſpaſs for taking forty Sheep of the Plaintiff, *ita quod per chaſiationem illam* they were much damnified, and one of them died. The Defendant juſtifies Damage-Feſant in his Free-hold. The Plaintiff replies, and claims Common in the Place where, *&c.* The Defendant rejoins and juſtifies by incloſure leaving ſufficient Common for all the Beaſts levant and couchant on the Tenement of the Plaintiff. The Defendant demurs, for that the Bar was ill in not anſwering to the dying of one of the Sheep. *Per Cur.* the Bar is good, and he need not; for coming under the *ita quod*, it is not but for Aggravation of Damages, at leaſt it is cured by the Replication over. Judgment *pro Def.* 1 *Levins* 283. *Leech* and *Midgly.*

Treſpaſs for taking forty Sheep and chaſing them, by reaſon of which chaſing one of them died. The Defendant pleads the Place in which the chaſing is ſuppoſed was his Free-hold, and that he *leniter* chaſed them, *quæ eſt ead' tranſgreſſio.* The Plaintiff replies, and juſtifies for Common. The Defendant rejoins by Incloſure. The Plaintiff demurs. It was urged for the Defendant, that the Bar is not good, becauſe he doth not anſwer to the chaſing of the Sheep, for he ought to have traverſed it. *Per Cur.* the Plaintiff relies by his Replica-

Replication upon the Common, and waves the chaſing the Sheep, *&c.* and therefore good enough. Judgment *pro Quer. Raym.* 185.

Treſpaſs *inter alia*, for breaking his Cloſe and digging four Cart Load of Stones, and carrying them away, and converting them to his own Uſe. The Defendant as to all *præter* breaking of the Cloſe and carrying away the Stones, pleads *Non culp.* and as to them he preſcribes to enter and dig Stones for the Reparation of his Houſe and Fences, which were out of Repair. On which the Plaintiff demurs generally. It was ſaid the Plea is not ſufficient, for that he doth not ſay he uſed them for Repairs, or at leaſt *penes ſe retinet ad reparand.* otherwiſe it may be he had ſold them, tho' at firſt he dug them and carried them away for ſucch an uſe. And the Juſtification was held not good. 3 *Levinz. p.* 323. in *C. B. Danby* and *Hodgſon.*

I have not made any References to the old Preſidents, becauſe Mr. *Townſend* is very large in that Title. So in the Title *Preſcription pur Chimin. Townſ. Tab.* 294, 295, 296.

By Preſcription, vide *Common*, &c.

Treſpaſs for taking and carrying away his Cheeſe. The Defendant juſtifies for that he was ſeized in Fee of *Chipping Sudbury*, and of an ancient Market there every *Thurſday*, and that he, and all thoſe whoſe Eſtate he hath, had uſed to have a Penny for every hundred Pound Weight of Cheeſe expoſed to be ſold in the Market, in the Name of *Pitching-Penny*, and on denial, to diſtrain; and that for the ſaid Penny for an hundred pound Weight, *&c.* being demanded and not paid, he diſtrained. On Demurrer Exception was taken, That the Defendant had not made ſufficient Title,

not having alledged Uſage, time out of memory, but only by all thoſe whoſe Eſtate he hath: and of this Opinion was the whole Court. Sir *Tho. Jones*, 227. *Goodwin* and *Brookes*.

De Chymin, a Way.

The Defendant pleads for one Parcel he was ſeized of an Houſe and thirty Acres of Land in C. and preſcribes to have a Way over them to his Common in *Barningham*: and for the other Parcel, preſcribes that he and all thoſe whoſe Eſtate he hath, uſed to have a Way for Pack-horſes unto the King's High Way leading to *N.* and Iſſue upon theſe two Preſcriptions, and found *pro Quer.* and good: For though the proper Uſe of a Way be to ſome End, and that ought to be ſhewn; yet if it be only that he had a Way over the Cloſes of the New Aſſignment, and no Place or End thereof is pleaded for what Cauſe, or to what other Place, and Iſſue is taken upon the Preſcription and found, the Preſcription is good. And though he mention not any Place where the Common lies, yet the Tryal is good; yet it may be intended to lie in *B. Hutton p.* 10. *Coble* and *Allen*. After Verdict it is aided. *Vide Cro. Eliz. p.* 427. *Brag* and *Bunning*.

Treſpaſs *quare clauſum fregit*. The Defendant pleads that the Manor of *C.* is an ancient Manor, and that *infra dict. Maner.* is a Cuſtom that every Tenant ſhall have a Way over the Place where, *&c.* It's an ill Plea, 1. Becauſe it appears not the Place where, is within the Manor. 2. It ſhould be *uſi fuer' habere. Siderfin Hill.* 16 & 17 *Car.* 2. *Cornelius* againſt *Taylor*. *vide infra.*

The Defendant pleads Preſcription *pur un driſt way, in per & trans clauſum quer.* 1 Brown 362.

Preſcription

Preſcription for a Way belonging to a Piece of Meadow of one *F. qui habuit viam pro tenentibus & firmarijs ad cariand. & fugand. a tempore falcationis uſq; ver*, &c. *& averia in utenda via ſua caſualit' momorder' herbam & contra voluntatem Def.* 1 Browne 377.

Juſtification al Novel Aſſignment pur Chymin Rogation-Week. 1 Browne 379. *Abſque hoc quod eſt culpabil. ante vel poſt talem diem.*

In Treſpaſs for entring a Cloſe in *N.* the Defendant juſtifies *quod Manerium Coldnorton eſt antiquum Manerium, & quod talis habetur conſuetudo infra Manerium quod quolibet inhabitans haberet viam per & trans* the ſaid Cloſe to the Ferry. The Plaintiff demurrs becauſe the Cloſe appears to be out of the Manor of *C. & quilibet inhabitans haberet* is no ſufficient Averment, to which the Court agreed; it ought to have been, That every Inhabitant within the ſaid Manor of *C.* hath had and uſed a Way over to *N.* &c. 1 *Keb.* 836. *Cornelius* and *Tapor.*

Juſtificatio quod ultra trans & ſuper præd. clauſum de novo aſſignat' fuer' 3 communes viæ pedeſtres & quod Def. tempore quo ambulabat in viis præd. Repl. proteſt. quod non fuere 3 viæ pedeſtres prout, &c. *pro placito quod Def. clauſum frigit & herbam ibid. creſcen' extra vias præ. pedibus ambulando conculcavit*, &c. *Rejoind. per manutenentiam. Placito. Surrej. quod Def. clauſum fregit extra vias præd. Iſſue inde.* 2 Browne 255.

Def. quod locus in quo, &c. *fuit terra vaſta, & præſcribit pro Stannar' fodere trenchias ad provehend. aquarum curſus ad opera Stannaria quotieſcunque operantur in eiſdem & dummodo terræ moræ & vaſta vaſtat' ſunt & non clauſa.* 1 Brown. 369.

Quod quilibet tenens cuſtumar. conſuevit habere pro ſe & ſervien' ſuis viam tam equeſtrem, &c. *ad carriand. & recarriand.* &c. *per & trans*

locum in quo, &c. *Et quia Quer. incluſit locum in quo*, &c. *cum quadam janua ſecat.* &c. *Def. ut ſerviens*, &c. *Januam præd. fregit. Repl. de injuria ſua propria, & traverſe le Cuſtom. Rej. quod talis habetur conſuetudo. Et Iſſue ſuperinde.* 2 Browne 248, 249.

The Defendant claims a Way from one Village to another by Preſcription, and the *Viſne* is out of two Villages. Exception was, That there are intervening Places between the two Villages. But *per Cur.* it is ſufficient if the *terminus a quo & ad quem* be joined, and the two Villages ſhall be intended to have conuſance whether a Way or not. *Pal.* 35.

Treſpaſs for treading down his Graſs, breaking and pulling down his Gate, and entring his Cloſe called the Yard, and breaking his Hedges. The Defendant, *quoad* the breaking the Hedges, pleads *Non Culp.* and for the reſidue juſtifies for a Paſſage by and through a Yard, and that at the time *quo, &c.* there was a Gate put upon the Paſſage, ſo that he could not paſs with his Beaſts, by which he broke and pulled down the Gate, and in paſſing trod the Graſs, *aliquantulum* which is *idem reſiduum*, of which he complains. The Plaintiff replies, that this is not *idem reſiduum* of which he complains. The Defendant demurs. It was objected that he may not juſtify the pulling down and breaking the Gate, not having ſhewed that it was lockt or nailed ſo that he could not paſs. But *per Cur.* having pleaded that the Gate was ſet there ſo that he could not uſe his Paſſage, ſhall be intended locked or nailed, or the Way ſo ſtraitned ſo as he could not paſs; and the Plea is good: and the Replication ſo general is idle and vain. 3 *Levinz.* 92. *Sprig* and *Neale.*

Treſpaſs *quare clauſum fregit, & herbam ſuam depaſt.* The Defendant pleads, That *J. R.* dis-

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anté the Treſpaſs, was ſeized of an ancient Meſſuage *cum pertinentijs*, and preſcribes for Common of Paſture in the Cloſe of the Plaintiff for his Beaſts levant and couchant upon the ſaid Meſſuage *cum pertinentijs* and makes Title to the Wife of *R.* for her Life, who had entred, *& adhuc ſeiſita exiſtit*, and conveys to himſelf the ſaid Meſſuage at the Will of the Wife, and juſtifies *utendo communia præd.* The Plaintiff demurs, becauſe the Preſcription is not good; for Beaſts cannot be ſaid levant and couchant upon a Meſſuage. *Per Cur.* the Preſcription is good; for this is not Common *appendant* but *appurtenant*, and ſuch Common is uſual in the County of *Lincoln* and other Counties; *& adhuc ſeiſita exiſtit* is a good Averment of the Woman's Life. Sir *Tho. Jones* 227. *Scamler* and *Johnſon.*

In Treſpaſs for breaking his Cloſe. The Defendant juſtifies to have a Way by Preſcription over the Land in which, *&c.* for carrying off ſuch Tithes *uſque ad Rectoriam de D.* from ſuch a Place. It's an ill Plea, there ought to be *terminus a quo, & terminus ad quem*; and the Word *Rectoria*, which ought to be *terminus ad quem*, is uncertain; for it conſiſts of divers things, as Glebe, Tithes, *&c.* but he ought to have ſaid, the Parſonage-Houſe, or other Place certain. And the Caſe was, the Rectory conſiſted only of Tithes, and the Tithes uſed to be lett to Farm to divers Perſons, who have carried ſuch Tithes to their own Houſes, and the Defendant is one of the Farmers of the Tithes. By *Wray*, if the Caſe be ſo, it ought to be pleaded in this Nature, That *J. S.* is ſeized in Fee of the Rectory of *D.* and that time out of Mind he and all thoſe, *&c.* have uſed for them and their Heirs formerly to have a Way to carry their Tithes from ſuch a Place over the Land where, *&c.* unto ſuch an High Way,

and name a Way which is next to the Place where the Treſpaſs was done (ſuppoſe he ſhould preſcribe to carry them over, *&c.* to his Barn belonging to his ſaid Rectory, or to the Parſonage-Houſe.) 2 *Leon. p.* 10.

A Preſcription is *ſtricti Juris*; therefore if one preſcribes *habere viam tam pedeſtrem quam equeſtrem cum omnibus carriagijs*, by this Preſcription he cannot have a Cart-way; it's better to preſcribe *habere viam pro omnibus carriagijs* generally, without ſpeaking of Horſe or Cart-way. 3 *Leon.* 13.

The Defendant juſtifies by a Way. The Plaintiff replies he went out of the Way. It's a good Replication; it is confeſſed and avoided. *Litt. Rep.* 45.

The Defendant juſtifies by Preſcription to have a Way over ſuch a Cloſe. The Plaintiff replies, That he drives his Cattle *extra viam.* The Aſſignment of the Treſpaſs out of the Way is a ſufficient Confeſſion of the Way; and the Way ſhall not be intended through all the Cloſe. *Litt. Rep.* 180. *Weſt* and *Phillips.*

In Treſpaſs for breaking his Cloſe, the Defendant juſtifies by reaſon of a Way from his Houſe through the place where, *uſq; altam viam regiam in Paroch. de D. vocat.* London-Road. Iſſue was joined upon the Way, and found for the Plaintiff. It was moved, there was no Iſſue joined, for the uncertainty of the *Terminus ad quem*, whither this Way ſhould lead, and one that juſtifies for a Way, if he alledgeth the Way from whence and to which, and that it leads over the Place where, it is ſufficient, though he miſtake the other mean Paſſages. But *per Cur.* in regard it is found that he had a Way over the Place where, it is not material to the Juſtification where it leads, it being

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after a Verdict, and ſo cured by the *Oxford* Act. 1 *Ventr.* 14. *Clarke* and *Cheney.*

Treſpaſs *quare clauſum fregit & diverſa onera equina* of Gravel had carried away, *per quod viam ſuam amiſit.* It was moved in arreſt of Judgment, That the *diverſa onera equina* was uncertain, and then mentioned the loſs of his Way, and ſets forth no Title to the Way, nor ſets forth any Certainty. *Per Cur.* after a Verdict yet the Exceptions are material. 2 *Ventr.* 73. *Blake* and *Clattee.*

Action for Treſpaſs done with his Cattle in two Cloſes of the Plaintiff's, the one called the *C.* Cloſe, and the other the *M.* Cloſe. The Defendant pleads the *C.* Cloſe is next adjoining to the *M.* Cloſe, and that the *M.* Cloſe is next adjoining to a Meadow-Cloſe, and that he and all the Occupiers of the Meadow-Cloſe have uſed *fugare & refugare averia ſua* from the Meadow-Cloſe to the *M.* Cloſe, and from thence to the *C.* Cloſe; and ſays an Eſtate in himſelf at Will in the Meadow-Cloſe, *&c.* The Bar is not good, becauſe the Cuſtom alledged by the Defendant is only to do a Wrong. 3. *Bulſtr.* 326. *Turner* and *Denning.*

A. hath a Way over *B.*'s Ground to *Blackacre*, and drives his Beaſts over *B.*'s Ground to *Blackacre*, and then to another Ground beyond *Blackacre.* It's a Treſpaſs; for by this means the Plaintiff might loſe the Benefit of his Land, if the Defendant purchaſe a thouſand Acres next adjoining to *Blackacre.* *Mod. Rep.* 190. *Howell* and *King.*

By Tithes.

Treſpaſs for breaking his Cloſe called *B.* and ſpoiling his Graſs *pedibus ambulando, & cum equis & plauſtris*, and taking and cutting his Graſs *ad valenciam*, &c. *& feni* of the Plaintiff, *viz.* 5

carectat. ad valenciam, &c. The Defendant, as to all *præter fraction. clauſi*, and ſpoiling the Graſs *pedibus ambulando, & cum equis & plauſtris*, *Non Culp.* and as to them he juſtifies, becauſe he is ſeized of the Tithes of Hay *ex eod' clauſo provenien. & quia fenum (videlicit) 5 carectat. feni præd. pro decimis feni ejusdem elevati fuer. ſeperat.* he entred the ſaid Cloſe to carry away the ſaid Hay, *& pedibus ambulando, & cum equis & plauſtris*, &c. ſpoiled the Graſs *dampnum tam modicum quam potuit faciend' qua ſunt ead.* &c. The Plaintiff replys, That the Defendant took the Graſs cut by the Plaintiff, and made this into Hay upon the Land, *& aſport. 5 carectat. feni* of the Plaintiff *in narratione c'pit & aſportavit, abſq; hoc*, that *fuerunt 5 carectat. feni in clauſo præd. pur Tithes ſeperat.* as the Defendant had pleaded. The Defendant demurs ſpecially, becauſe the Plaintiff traverſeth the Quantity of the Hay ſeparated for Tithes, which is not traverſable; and of that Opinion was all the Court: For the Defendant having pleaded *Non Culp.* to all *præter* the ſpoiling of the Graſs, and juſtifies by entry and taking his Tithes of Hay; this is good be the Tithes carried in one or two Carts, and it was lawful for the Defendant to make the Hay upon the Land after it was ſeperated. Judgment *pro Quer.* 3 *Levinz.* 228. *Pain* and *Bregham.*

For Eſtovers and Turbary.

¶ Preſcription to have *omnes Spinas*, &c. to be employed and ſpent in ſuch a Meſſuage. This is not properly Eſtovers; for Eſtovers is but to Parcel of the Wood. *Yelv. p.* 188. *Dewclaſſe* and *Kendall.*

Treſpaſs for cutting down four Oaks. The Defendant preſcribes *habere rationabile eſtoverium ſuum*

ſuum for Fewel, *ad libitum ſuum capiend. in boſcis ſubboſcis & arboribus ibid. creſcentibus*, and that *in quolibet tempore anni* but in Fawning time.

The Plaintiff replies, That the Place where, *&c.* is within the Foreſt of, *&c.* and that the Defendant and all thoſe whoſe Eſtate, *&c. habere conſueverunt rationabile eſtoverium ſuum de boſcis*, &c. *per liberationem foreſtarij & non ad exigentiam petentis.* The Defendant demurs. Exception was taken to the Bar, becauſe he hath not ſhewed that at the time of the cutting it was not Fawning-time, for at the Fawning-time the Preſcription did not extend to it; and it was held a material Exception. But the Replication is ill; for he ought either to have pleaded *Lex Foreſtæ talis eſt*, &c. or elſe he ought to have traverſed the Preſcription of the Defendant. Had the Plaintiff in his Replication ſhewed *Lex Foreſtæ*, &c. then the Preſcription of the Defendant had been anſwered without any more; for none can preſcribe againſt a Statute. Judgment on the Replication was given againſt the Plaintiff. 2 *Leon. p.* 209. *Ruſſel* and *Broker*'s Caſe, though the Defendant's Plea in Bar was naught. *Quod mirum!*

Juſtifie by Preſcription to have Eſtovers to repair the old Houſes or building of new, adjudged good by three againſt *Williams. Cro. Jac.* 25. Counteſs of *Arundel* verſus *Steere.*

Treſpaſs for burning the Plaintiff's Turves. The Defendant juſtifies that the Turves were upon the Land where he had Common (and ſhews Title to it) and for Damage-Feſant he burnt the Turves. The Plaintiff demurs, and had Judgment: for the Defendant may not burn the Turves for this Cauſe. Sir *T. Jones* 192. *Bromhall* and *Norton.*

Preſcription pur Eſtovers. Tompſ. 318, 327, 329, 410.

Juſtifica-

Juſtification pur Eſtovers per Preſcription. Winch. p. 1115. vide Cro. 2. 25. *Counteſs of* Arundel's *Caſe.*

Per Preſcription pro Eſtovers. Repl. Quod libe. rum tenementum premiſſorum eſt in quer. 2 Brown 277.

In Treſpaſs for entring and digging his Land. The Defendant pleads he is ſeized of an ancient Meſſuage in *D.* and that he and all thoſe whoſe Eſtate, *&c.* have had fourteen Days Delf of Turves in the Place where, *&c. tanquam ad Meſſuag. præd. pertin.* On Demurrer the Barr is ill, becauſe he ſaith not the Turves were to be burnt or ſpent in the ſaid Meſſuage. *Sid.* 354. *Hayward* and *Cannington.*

Waifs and Eſtrayes.

Def. juſtifie captionem equi ut extrahur. infra Precinct. Manerij. 1 Browne 374. *Per Preſcript'* Tompſ. 420.

An eſtray Colt may be fettered if he be wild. If the Lord make not Proclamation in convenient time, the Poſſeſſion of an Eſtray becomes tortious, and the Lord may not keep him for the Year elſe-where than in the Manor. *Winch. Rep. p.* 67. 124. *Pledall* and *Goſmore.*

Quod cepit juvencas ut extrahur. infra maner. in quo ipſe habuit extrahur' per preſcription. & fecit proclam. earundem in 2 villis mercatorijs per 2 dies, & quod quer. non venit ad clamand. infra diem & annum. Replic. de injuria ſua propria, & traverſe le Preſcription. Ra. Entr. 638. Townſ. Tab. 298.

Des Incloſures. Bar by Default of Incloſures.

Treſpaſs in *Great Long Mead* with a *Continuando*. Def. *Proteſtando* that the Treſpaſs was not continued *modo & forma*, &c. pleads, That at the time of the Treſpaſs he was poſſeſt of a Cloſe called *Wood-end* for a certain Term then and yet to come, to a certain Cloſe called *Little Long Mead*, *contigue adjacen'*, and the *Great Long Mead* lies contiguous to *Little Long Mead*, and that the Plaintiff was *tempore quo*, &c. poſſeſt of the ſaid Cloſes called *L.* and *G.* for Years, and that the Plaintiff *præd. tempore quo*, &c. *debuit reparare facere & manutenere ſepes*, &c. *tam inter le Cloſe vocat.* Woodend, and the Cloſe called *L.* as between *L.* and *G.* and the Defendant *poſuit averia in Woodend* to feed, and avers, That the Plaintiff *tempore quo permiſit ſepes inter le Cloſe vocat.* W. and the Cloſe called *L.* and *G.* *in quo* for default of Reparations *remanere aperte confract. & minime reparat. per quæ*, &c. Two Exceptions to this Bar; 1. The Defendant ſaith he was poſſeſt of *Woodend*-Cloſe, but doth not ſay of what Leaſe and for what Time. *Per Cur.* he need not; the Intereſt of that Cloſe is not in queſtion, but it's collateral, and inducement: For be he ſeized by Title or Tort, the Poſſeſſion of the Land is ſufficient to juſtify his putting in his Beaſts. 2. He ſaith, *Quod quer. debuit reparare*, &c. and ſhews not by what Title or what Sort, as Covenant or Preſcription. *Per Cur. non allocatur.* Diverſity, where a Right of Incloſure to charge an Inheritance is in Queſtion, there the Right muſt be ſhewn, as in *curia claudenda*, and where it goes only in excuſe of a *Tranſ. hac vice.* *Yelv. p.* 74. *Faldo* and *Ridge*.

Defendant's

Defendant's Plea not good: For he pleads a Preſcription where it ought to be a Cuſtom, that the Occupiers of the Land ought to make the Fences, and he ought not to preſcribe in the Perſon. *Stiles Rep.* 538. *Baker* and *Andrews.*

One had encloſed two Acres of Common (where the whole Common was but three Acres) for to enlarge the Curtelage of his Houſe (without ſaying it was an ancient Houſe) and ſo juſtifies *per Stat. W. c.* 46. *Per Cur.* it doth not appear that it was for his neceſſary Reſiance, and he may not encloſe. *Siderf. p.* 79. *Nevill* and *Hamerton.*

H. ſeized of *Bl.* that ought to repair againſt *B.* yet if the Cattle of *A.* come through the Lands of *B.* in Treſpaſs by *H. A.* cannot plead default of Repair in *H.* 1 *Keb.* 186. in *Parnell* and *Rowe's* Caſe.

If the Defendant plead this Plea, he muſt have ſome Intereſt in the adjoining Ground, as being Leſſee for Years or at Will, or having Common, or having his Cattle there to tack, or having leave to put his Cattle there, and the Cattle muſt go into the Plaintiff's Ground of themſelves.

If he plead there was no good Incloſure, he muſt ſhew that the Owner (time out of mind) did uſe to incloſe it, and it will be a ſufficient Proof to maintain his Plea, that the Mounds were bad at the time, though it cannot be proved the Cattle went in, for that is preſumed. *Dier* 365. *Bro. Treſp.* 136, 148, 192, 255, 345.

Treſpaſs for entring his Cloſe, and taking and impounding the Plaintiff's Oxen. The Defendant pleads Sir *H. V.* was ſeized in Fee of a Cloſe called *Low-Leaſon*, in *Poplor*, being the *locus in quo*, &c. and demiſed the ſame to the Defendant for 99 Years, determinable upon three Lives, and juſtifies the taking Damage-Feſant. The Plaintiff replies, and confeſſeth the Seiſin of Sir *H. V.* and the Leaſe; but

but further ſaith, That Sir *H. V.* was ſeized of another Cloſe called *Bownes*, adjoining to *Low-Leaſon*-Cloſe, and a Cuſtom in *Poplor*, that the Occupiers of *Low-Leaſon*-Cloſe ought to repair the Fences between the two Cloſes: That the Fences were out of Repair, and that the Cattle went into the Defendant's Cloſe *pro defectu ſepium*. Iſſue on the Cuſtom, and Verdict *pro Quer*. *Per Cur.* the Cuſtom if good is extinguiſhed by the Unity of Poſſeſſion, and the Cuſtom being laid in the Occupiers is good; or it may be laid in thoſe that have the Inheritance. *Raym.* 192. *Bolus* and *Henſtork*.

That the Cattle went out of the High Way for want of Repairs of Fences, is a good Juſtification; but if they go further into another's Ground, whoever is to repair, it's a Treſpaſs. 3 *Keb.* 388.

The Defendant juſtifies Damage-Feſant. The Plaintiff Replies, That his Cattle eſcaped into a Cloſe called *Vicars*, in which he uſed to have Common by cauſe of Vicinage, and thence eſcaped into the Defendant's Grounds, into the *locus in quo*, &c. in default of Repair by the Defendant, who by Preſcription ought to repair againſt *Vicars*-Cloſe. *Per Cur.* this is a ſufficient Excuſe of Treſpaſs: and ſo where-ever the Party hath Way or ſpecial Privilege, as out of the common High Way into adjoining Grounds, in default of the Owner's repair. 3 *Keb.* 417. *Baynard* and *Smith*. *Vide plures Referentias ad Preſident*. Townſ. Tab. 530.

WRECK.

Wax wrecked and caſt on a Manor, not liable to Tonage and Poundage. *Vaughan Rep.* 159.

Juſtif. Def. ut Ballivus cepit bona in narratione ut Wreccum Maris. 2 Browne 177.

Ra. Ent. 684. *bis.* Title to Wreck pleaded.

De

Of *Chaſes*, and *Parks*, and *Warrens*. Vide ſupra.

Treſpaſs *quare clauſum & liberam Warrenam fregit*, &c. The Defendant juſtifies, the Lord made Coney-Burrows, and the Sheep fell into the Holes, *&c.* and the Defendant chaſed the Coneys, and digged down the Burrows, and filled up the Holes. It's not a good Juſtification; he ought to have confeſſed or avoided the Treſpaſs; and the Defendant cannot juſtify the killing the Coneys, and this Plea confeſſeth he had a free Warren. 2 *Bulſtr.* 116, 117. *Carrill* and *Pack.*

In Action of Treſpaſs, *per Cur.* when a Man claims a Warren *infra omnes terras Dominicales*, he cannot extend this into the Land of Free-holders; for none ſhall enlarge his Charter. *Aliter* where he claims the Warren by Preſcription. 2 *Bulſtr.* 255. *Fowler* and *Seagrave.*

In Action ſur Stat. de Malefactoribus in Parcis, though the King pardon the Offence, yet the Party hath Remedy for the Wrong. *More* 157.

De Piſcharijs.

Treſpaſs *quare Piſchatus fuit in ſeperali Piſcharia.* The Defendant ſaith the *locus in quo* was an Acre of Land covered with Water, which was his Free-hold. Good Plea. 8 *H.* 8. But *Horl. Ter. Trin.* 19 *H.* 7. *caſe* 11. *dedicit.*

The Defendant juſtifies in Aſſault and Battery, as Servant to *J. S.* becauſe the Plaintiff came to Fiſh in the ſeveral Piſchary of his Maſter. Judgment given *pro Def.* and Error. 1. Whereas the Defendant had intitled his Maſter to the ſeveral Piſchary by the King's Letters Patents, he had not ſhewed that the King was ſeized of it *in jure Coronæ*, and ſo it might be the King had no Power

Power to grant it. 2. He doth not ſhew the Letters Patents as he ought, becauſe he derives a Title by them. *Stiles Rep.* 15. *Jones* and *Young.*

A ſeveral Piſchary *uſq; ad filum aquæ* cannot be counted on, but ſuch Evidence might be given of ſuch a Piſchary by Meets and Bounds. If the Plaintiff derive a Title as high as the *Abbeys*, he need not ſhew any Patent from the Crown. 1 *Keb.* 490. Sir *Chr. Guiſe*'s Caſe.

The Defendant preſcribes *pur un* Water-Courſe *pro Piſcatione in Stagno.* Tompſ. 323. Vide Townſ. Tab. 299.

Of Fairs. Toll.

Juſtification by digging Soil and ſetting up Hurdles in a Fair. *Sid. p.* 291. *Popham* and *Woolcott.*

The Defendant juſtifies the taking a Cow, That the Biſhop of *D.* had a Fair by Letters Patents with Toll, and that the Plaintiff ſold Hides, and the Defendant demanded 1 *d.* for Toll. It's ill. Here is no Grant or Preſcription laid for diſtraining, and Toll is againſt common Right. 1 *Keb.* 342. *Harris* and *Hawkins. Tompſ. p.* 426. *Townſend. Tab.* 299.

In Treſpaſs for driving the Beaſts of the Plaintiff the Defendant juſtifies by Preſcription for Toll over ſuch a Manor. *Per Cur.* Toll may be appurtenant to a Manor as well as any other Profit *apprender*, and a thing that lies in Grant cannot be claimed by a *que Eſtate* directly in it ſelf, but it may be claimed as appurtenant to a Manor, by *que Eſtate* in the Manor. *Mod. Rep.* 231. *James* and *Johnſon.*

Treſpaſs

Treſpaſs *quare Piſces ſuos cepit in ſeperali Piſcharia.* Verdict *pro Quer.* It was moved that the Plaintiff ought not to have called them *Piſces ſuos*, unleſs they had been in a Trunk or Pond. In Action for taking of Coneys in a Warren, he ſhall not ſay *Cuniculos ſuos. Sed per Cur.* it might be intended a Stew-Pond, which is a Man's ſeveral Piſchary, and it ſhall be intended good after a Verdict. Otherwiſe upon a Demurrer, by Reaſon of the Local Property. 1 *Ventr.* 122. *Polexfin* and *Criſpin.*

Bar by Ancient Demeſne.

In Treſpaſs *vi & armis*, though the Free-hold come in Debate, yet ancient Demeſne is no Plea; the Iſſue is upon the Tort. *Hob. p.* 47. in *Cox* and *Barnſley's* Caſe.

In 5 *Rep.* 105. *Alden's* Caſe. If Treſpaſs be in the King's Court where the Realty comes in Debate, Ancient Demeſne is a good Plea. As in Treſpaſs for Trees where the Defendant claims the Free-hold.

But in Treſpaſs whereunto the Defendant upon the new Aſſignment pleads Not Guilty, and upon ſpecial Verdict it is found that the Land in queſtion is Ancient Demeſne, and the Plaintiff recovered 40 *l.* in *C. B.* and the Sheriff extended the Land, and good. *Hob. p.* 47. *Cox* and *Barnſley.*

Ancient Demeſne is no Plea upon the Stat. 5 *R.* 2. *c.* 7. though the Free-hold come in debate, *Hob.* 47. becauſe Damages are only to be recovered.

None may plead this Plea but the Terre-tenant. 2 *H.* 7. 17. *Pl.* 1.

If a Treſpaſs be in the King's Court where the Realty may come in debate, ancient Demeſne is a good Plea; as for cutting Trees where the Defendant

dant claims Frank-Tenement: otherwiſe it is no Plea. 6 H. 4. 1.

Tranſ. pur aſportatione un pecie Corii quod Def. diſtrinxit ill. pro tolnet. en un faire erect. per Letters Patents. Repl. quod Quer. fuit inhabitans infra villam de antiquo Dominico Coronæ Angliæ tent. & quod præd. pecia Corij fuit de proficuis tenementorum ſuorum ibid. Rej. Def. maintain ſon declarat. & traverſe quod fuit de proficuis tenementorum. Tompſ. 303.

Ancient Demeſne pleaded, Tompſ. 357. *Repl. Fine levyed per quod terres deven. Frank-fee.* Tompſ. 348. *Repl. Quod Clauſum in Nar' non continetur in Fine. ibid. Rej. Quod quidam impetravit Breve de recto Clauſo de terris præd. & ill. proſecut. fuit in Curia Manerij præd. Ideo non fuer' Frank-fee.* ibid.

CAP. XVII.

Of Bars in Treſpaſs concerning Goods and Chattels.

I Shall now ſpeak ſomething as to Juſtifications and Bars in Treſpaſs concerning Goods, &c. and they are

Bars in Title, or *quaſi* Title, as

Property,
Sale,
Gift,
Delivery in Satisfaction,
} *Impignoration,*
Allowance by Law,
By Cuſtoms or
Sequeſtrations.

Or elſe Juſtification by way of Excuſe, as

For Neceſſity,
Execution of Law.

By Property.

Quod Def. poſſeſſionat. fuit de bonis & dat colorem, &c. *Repl. & traverſe quod proprietas fuit Def.* Ra. Entr. 632.

Quod proprietas bonorum fuit Quer. & H. qui dedit purpartem ſuam Def. Ra. Entr. 653.

Of Property and Poſſeſſion. *Vide Sparſim per tot.*

Quod proprietas averiorum & bonorum fuit cuidam J. qui ea deliberavit cuſtodiend. M. nativo quer. extra cujus poſſeſſion quer. ea cepit. Repl. quod proprietas inde fuit prædict. M. & traverſe quod

quod proprietas inde fuit prædict. J. Ra. Entr. 637. vid. Ra. Entr. 606.

Quod proprietas averiorum fuit Def. & non Quer. Hern 676. Ra. Entr. 568, 614.

Tranſ. de bonis capt. quod J. poſſeſſ. de bonis accommodavit ea Quer. pro menſe. Repl. proprietas bonorum fuit Quer. & traverſe quod proprietas fuit J. Ra. Entr. 614, 632.

Vide plura Ra. Entr. 637, 646, 653.

By Vendition.

Quod Quer. vendidit bona Def. Repl. Non vendidit Ra. Entr. 675.

Quod D. poſſeſſionat. de equo vendidit eum Def. in aperto mercato. Repl. Quod T. Poſſeſſionat. de equo vendidit eum Quer. & traverſe. Ra. Entr. 675. Vet. Intr. 100.

Quod proprietas equi fuit Def. quouſq; fuit capt. per malefactores ignotos, & qui poſtea venit ad manus Quer. extra cujus poſſeſſionem Def. illum cepit. Repl. Quod Quer. emebat eum in aperto mercato, & ſolvit tolnetum pro eod. Ballivo Ville. Sp. B. 151.

In Treſpaſs, if the Defendant plead a Vendition in Market overt, this is good without giving Colour, though he ſaith a Stranger was poſſeſt of the ſame as of his Proper Goods; contrary to 12 *Ed.* 4. 5, 6. 10 *Rep.* 90. b. *Liford's* Caſe. 1 *Rolls* Rep. p. 273. *Biſſe* and *Tiler.*

In Treſpaſs the Defendant pleads he bought the Goods in Market overt of one *J. O.* The Plaintiff replies, the Sale was by Covin between the Defendant and *J. O.* generally, without ſhewing any thing eſpecially of the Covin, and good. *Lovd. Com.* 46. a. 55. a. *Wimbiſh* and *Talboys.*

Quod Quer. per Servient. vendidit averia Def. qui ea abduxit. Repl. De injuria propria, & traverſe le Sale. Ra. entr. 675.

Treſpaſs for taking away his Cattle. The Defendant pleads he bought them in a Market overt. Demur, becauſe the Defendant doth not ſhew what Day the Market was kept, nor whether it were out of *Lent*, according to the Patent for keeping of the Market. This ought to have been averred in the Plea, *per Cur. Stiles Rep. p.* 113. *Marſhall* and *Porter*.

Per Done.

Quod Quer. dedit vinum Def. per quod cepit. Repl. De injuria ſua propria, & traverſe le Don. Ra. Entr. 636.

Pro bonis aſportat. The Defendant makes Title to himſelf as Executor, and gives Colour to the Plaintiff by a former Will. Repl. *Quod non fecit tale poſterius Teſtamentum, pro placito que le Teſtator done eux a lui, & iſſue ſur le done.* Winch. Entr. p. 1115. Ra. Entr. 641.

Done pleaded by *S.* Repl. That *J. S.* died poſſeſt, and the Plaintiff adminiſtred, *&c.* and traverſe *quod S. dedit Def.* Ra. Entr. 637. *Vide plus* in Townſ. Tab. 293.

Bona deliberat. ad cuſtodiend.

Quod Proprietas bonorum fuit cuidam J. qui ea deliberavit cuſtodiend. M. extra cujus poſſeſſion. Quer. ea cepit. Ra. Entr. 637, 640, 653.

Per Delivery in Satisfactione Debiti.

Quod Quer. indebitat. Def. in 20 l. *deliberavit bona Def. in ſatisfactione debiti. Repl. de injuria*

ſua

ſua propria, & traverſe le Delivery. Ra. Entr. 614, 615.

In Treſpaſs it's a good Plea to the Action, That the Plaintiff delivered them to him. 2 *Ed.* 4, 5. The Plaintiff in 45 *Ed.* 3. replies, That the Defendant took them tortiouſly.

Quod deliberavit B. 14 l. *ſolvend. A. cui billas dedit. Repl. quod Quer. non deliberavit ei denarios.* Ra. Entr. 614.

De domo fract. & 30 l. *aſportat. Bar quod Def. vendidit terras Quer. pro* 30 l. *ſolven. ſuper requiſition. & Quer. requiſivit Def. intrare domum ad recipiend.* &c. Ra. Entr. 619.

Per Impignorat'.

Quod Quer. per Uxorem impignoravit bona Def. pro Denar. ei antea accommodat. per Def. Repl. de injuria ſua propria. Up. B. 191.

It is a good Plea, 21 *H.* 7. 13.

If an Horſe be in an Inn-Keeper's Hands he may detain him for his Meat; but if he be once out of his Poſſeſſion, he cannot juſtify the re-taking of him in Treſpaſs. *Aliter* if an Agreement be, As, take this Horſe till I ſatisfy you 10 *l.* for by this he had ſpecial Property, and as a Pawn. 2 *Rolls Rep.* 438. *Roſſe* and *Brämſteed.*

If one Pawn a Gold Chain for Money delivered at the ſame time, if Action of Treſpaſs is brought againſt the other for the Chain, the Defendant cannot plead that the Plaintiff licenſed him to take the Chain and retain it till the Plaintiff had paid the Money; but he ought to ſay, *impignoravit* the Chain to him. *Pl. Com.* 542. a. 5. *H.* 7. 1.

Treſpaſs for Eſcripts and Bar. Vide ſupra Tit. *Tort al Biens.*

Treſpaſs *quare vi & armis* for cancelling a Deed. The Plaintiff in his Declaration ſhews, That the Defendant was ſeized in Fee of Lands, and of this did infeoff *J. S.* and his Heirs with Warranty, reſerving Rent; and that afterwards the Defendant did by his Deed bargain and ſell the ſaid Rent to the Plaintiff, for the cancelling of which Deed (the which the Plaintiff *caſualit' amiſit*) this Action is brought. The Defendant traverſeth the Grant of the Rent. *Per Cur.* the Traverſe is naught, being but Conveyance to his Action: But becauſe the Plaintiff hath not ſhewed in his Declaration that he ever was poſſeſſed of the Deed, *querens nil cap. per billam.* 1 *Bulſtr.* 214. *Suckfield* and *Conſtable.*

Quod pater Def. ſeiſitus de Manerio dedit illud Def. & Uxori in talio, & dedit ei pixidem cum chartis pro conſervat. ſtatus. Rep. Quod pater dedit illud Quer. & traverſe quod dedit Def. Ra. Entr. 84.

By Allowance of Law.

In Treſpaſs the Caſe was, Leſſee for Life of an Houſe and Land dies, his Executors ſuffer his Cattle to go there for ſix Days after his Death, and then removed them: and juſtifies for that time, averring, That for that time they could not procure any other Land or Place to put the Cattle in. Judgment *pro Def.* for the Law allows a convenient time to remove them. *Cro. Jac.* 204. *Stodden* and *Harvey.*

But in Treſpaſs for the taking and carrying away of a Dyer's Fatt. On ſpecial Verdict it was found

found that the Sheriff attacht it for debt, *&c.* being faſtned to the Wall of the Houſe, and delivered it to the Defendant. *Per Cur.* it cannot be attacht: If a Furnace be fixt *in medio domus* it is removable, otherwiſe if fixt to the Walls; and though the Plaintiff hath it by the Delivery of another yet he was preſent and took it, and ſo was an immediate Treſpaſſor. *Cro. Eliz. p.* 374. *Day* and *Bisbitch.*

Bar by Cuſtoms by Law.

Per perambulation' Parochiæ. Ra. Entr. 617. Co. Entr. 651.

Def. amovit tegulas domus Quer. ad reparand' gutturam ſecund. conſuetudinem burgi. Ra. Entr. 619.

Optimum animal pro mortuario. Up. B. 188.

The Defendant pleads Priſage of Wines *per Cuſtome del terre.* The Plaintiff replies *de ſon tort, abſque hoc* that there was any ſuch Cuſtom. 2 *Bulſtr.* 250. *Kennicott* verſus *Boyen.*

Juſtificatio pur chaſer un hare ove dogs inter Mich. *&* Aſhwedneſday *per cuſtom del County, & travers le tranſ. al aſcun auter temps.* 1 Browne 365.

By Letters Patents.

In Treſpaſs for taking away Goods. The Defendant juſtifies, That at the time of the Treſpaſs ſuppoſed he was Mayor of the Town of C. and that the King granted to the Mayor and Commonalty, and their Succeſſors all the Goods of Men out-lawed within the ſame Village, and that the Plaintiff was out-lawed. A good Plea, without ſhewing the Letters Patents. *Plowd. Com.* in *Partridge's* Caſe. *fo.* 81. b. for they belong to the

Mayor and Commonalty. *Vide plus de hoc ſparſim.*



By Order of Commiſſioners of Sewers.

Treſpaſs for taking and impounding a Mare till the Plaintiff pays 10 *l.* The Defendant juſtifies he diſtrained her by virtue of an Order of Commiſſioners of Sewers, for a Tax aſſeſſed by them on the Plaintiff. The Plaintiff demurrs. 1. It appears not that the Commiſſioners had Authority, for it ought to be done by ſix. 2. It appears not here they were all of the *Quorum*, as they ought. 3. There appears no fault in the Plaintiff why he ſhould be taxed. 4. The Number of the Acres of Land doth not appear, upon which the Tax was laid. 5. It doth not appear that the Land taxed did lie within the Juriſdiction of the Commiſſioners. *Stiles Rep.* 178. *Bungy* and *Lee.*

Bar by Sequeſtration.

In Treſpaſs for taking away four Loads of Wheat. The Defendant juſtifies, That the Plaintiff is Rector, *&c.* and ſo bound to repair the Chancel, and it being out of Repair, the Biſhop (after Monition to the Plaintiff to repair the ſame) had granted a Sequeſtration of the Tithes of the Rectory, and the Defendants being Church-Wardens, had taken them into their Hands. The Plaintiff demurs. They ought to aver, that they did not take more into their Hands than was ſufficient for the Reparation thereof. But of the Matter in Law, *quære. Mod. Rep.* 259.

A Sequeſtration out of Chancery may be pleaded in Bar to an Action of Treſpaſs at the Common Law; the Court of Chancery at *Weſtminſter* preſcribes to grant ſuch Proceſs. *Mod. Rep.* 259.

Juſti-

Juſtification in Treſpaſs concerning Goods and Chattels, partly by way of Excuſe, and Forms of Pleading.

Neceſſity.

As if Paſſengers in a Barge caſt the Goods over-board in a Tempeſt, it is juſtifiable. *Co.* 12 *Rep. Mouſe's* Caſe. 2 *Rolls Abr.* 567. 2. But if the Barge be ſurcharged, The Owners ſhall have remedy againſt the Ferry-man.

Beaſts of the Foreſt come into my Land, and I chaſe them with a Dog and recall him, yet he purſues them into the Foreſt and kills them, I ſhall be excuſed. 4 *Rep.* 38. b. *Tirringham's* Caſe.

If my Dog Chaſe and kill Cattle without my Incitation, *Non Culp.* is a good Plea in Treſpaſs. *Dier fo.* 29. *Pl.* 195.

Treſpaſs for aſſaulting and killing the Plaintiff's Maſtiff. *Vide prius.*

If my Sheep are mingled with others, I may chaſe all the Sheep, to ſever my Sheep, but not drive them away. *Latch. p.* 13. *Cro. Jac.* 568. *vide* 2 *Rolls Rep.* 163.

Treſpaſs of Aſſault, Battery and Wounding of the Plaintiff's Eye by the ſhooting a Gun charged with Powder and Hail-ſhot, by which he loſt the ſight of his Eye. The Defendant ſaith *Actio non*, becauſe he is, and at the time of the Treſpaſs was an Officer for the collecting Hearth-Money, and for the better diſcharge of his Office, and the more ſure keeping of the Money collected, he carried Fire-Arms with him, and having one of the Piſtols in his Hands, and intending to diſcharge it, *ne aliquod dampnum eveniret*, he diſcharged it (*ne-mine in oppoſit. viſ. exiſten.*) and whilſt he diſ-

charged

charged it, the Plaintiff caſually *viam illam præterivit & ſi aliquod malum ei accideret, hoc fuit contra voluntatem* of the Defendant, *Quæ eſt eadem* Treſpaſs. *Per Cur.* the Plea was inſufficient; for in Treſpaſs the Defendant ſhall not be excuſed without inevitable Neceſſity, which is not ſhewed here. Alſo the Defendant doth not traverſe, *abſque hoc, quod aliter, ſeu alio modo.* Sir *T. Jones* 205. *Dickinſon* and *Watſon. Vide Hob.* 134.

Pleading by way of Excuſe or Miſtake.

Treſpaſs for breaking his Cloſe called the *Baulk* and the *Hade*, and reaping of his, *&c.* and carrying it away. The Defendant diſclaims any Title to the Lands of the Plaintiff, but ſaith that he had a Baulk and an Hade adjoining to the Baulk and Hade of the Plaintiff; and in ſowing his own Land he involuntarily and by miſtake ſows ſome of his own, *&c.* upon the Plaintiff's Baulk and Hade, intending only to reap the, *&c.* growing on his own Baulk and Hade, and carried them away, *quæ eſt eadem*, &c. and that *ante emanationem brevis* he tender'd two Shillings in Satisfaction, and that this was ſufficient amends. The Plaintiff demurs, and Judgment *pro Quer.* For it appears that the Fact was voluntary; and his Intents are not traverſable, neither can be known. 2 *Levinz* 37. *Baſely* and *Clarkſon.*

In all civil Acts the Law doth not ſo much regard the Intent of the Actor, as the Loſs and Damage of the Party loſing.

Treſpaſs *quare clauſum fregit, & pedibus ambulando* in ſix Acres. The Defendant pleads he hath an Acre lying next to the ſaid ſix Acres, and upon it a Hedge of Thorns; and he cut the Thorn, and they (*ipſo invito*) fell upon the Plaintiff's Land, and

and the Defendant took them off as ſoon as he could, which is the ſame Treſpaſs: and adjudged for the Plaintiff. For though a Man doth a lawful thing, yet if any Damage thereby fall to another, he ſhall anſwer it if he could have avoided it.

A Man ſhoots at Butts and hurts another Man unawares, Action lies. If I have Land through which a River runs to your Mill, and I lop the Sallows growing on the River ſide, which accordingly ſtop the Water ſo as the Mill is hindred, Action lies. If I am building my own Houſe, and a piece of Timber falls on my Neighbour's Houſe, and breaks part of it, Action lies. If a Man aſſault me, and I lift up my Staff to defend my ſelf, and in lifting it up hit another, an Action lies by that Perſon; and yet I did a lawful thing. And the Reaſon of all theſe Caſes is, becauſe he that is damaged ought to be recompenced. *Aliter* it is in Criminal Caſes; for there *actus non facit reum niſi mens eſt rea.* Raym. 422, 423.

One knowing that Execution would be made on his Goods, procures *J. H.* by covin to ſet his Cart in the Yard, to the Intent that the Bailiff ſhould take it in Execution, ſo as to have Treſpaſs againſt him; and the Bailiff does take it, and after he knew it ſent back the Cart; yet *J. H.* brought Treſpaſs. Chief Juſtice, The Bailiff may plead the Fraud in Excuſe. *Palm.* 395. *Grome* and *Grome.*

For the Execution of Law-Proceſs.

Vide ſupra Juſtif. for Entry into Land.

The Defendant as Bailiff juſtifies by Warrant in Court-Baron on Recovery in *Aſſumpſit*, not ſhewing the Cauſe thereof to ariſe within the Juriſdiction of the Court. It's ill. So in ſuch Inferior Courts to ſay *taliter proceſſum fuit* till the Defendant

dant had Judgment and Execution. 1 *Keb.* 840. *Hoyland* and *Bacon.*

In treſpaſs of taking Cattle, the Defendant pleads recovery in the County Court of *York* of Coſts and Damages in ſeveral Promiſes generally, and that the Defendants as Bailiffs, by *Fieri Facias* took the Cattle. *Per Cur.* this is no Bar in any Court without the particular Original Suit, &c. Judgment *pro Quer. ſur Demurrer.* 2 *Keb.* 669. *Broadbelt* againſt *Peters.*

Treſpaſs for entring a Brewhouſe, and taking Goods. The Defendant juſtifies for the Duty of Exciſe on 22 *Car.* 2. *cap.* 23. on Order by Commiſſioners after Information, and that they informed *A. B.* and *C.* Juſtices of the Peace, and that the ſaid Juſtices did make no determination. Several Exceptions were taken, which (becauſe it is upon a late Statute) I ſhall ſet down. 1. They do not ſay, That they nor any two of them, for the Statute gives Power to two to do it. 2. It's not ſaid theſe are the next inhabiting Juſtices. 3. It's not averred that the Juſtices were not Commiſſioners. 4. The Sub-commiſſioners have Power to determine Penalties and Forfeitures, and this Information is for the ſingle Duty, and ſo not within their Juriſdiction. 5. It was ſaid, That on default of the Juſtices in not determining, the Defendant informed *D.* and *E.* Sub-commiſſioners, and ſaith not how or in what Place, which is traverſable. 6. The Defendant juſtifies continuance in the Houſe fourteen Days, which is ill without Licence. Judgment *pro Quer.* 3 *Keb.* 670. 681. *Daſhwood's* Caſe.

Treſpaſs for taking away a Mare. The Defendant pleaded as the King's Bailiff he by Precept out of the Court of *P.* to make Execution, made it on *Levari fac.* and to bring the Money into the ſaid Court, adjudged for the Plaintiff there. *Per Cur.*

Cur. he ought to ſhew the Juriſdiction of the Court, becauſe he juſtifies as Bailiff of an Inferior Court; and it muſt appear the Court hath Conuſance of the Cauſe, otherwiſe he cannot execute their Precept. 1 *Keb.* 53. *Crofts* and *Wilkinſon.*

Treſpaſs for taking his Beaſts. The Defendant juſtifies by Plaint levied in the Hundred Court by the Plaintiff againſt *J. S.* upon which *taliter proceſſum fuit*, that the Plaintiff was nonſuited, and Coſts taxed, and a Precept to levy, by which he took the Beaſts, and traverſeth that he was guilty *ante deliberationem Præcepti*, or after the Return, upon which the Plaintiff demurs. Exceptions:

1. This way of pleading a Judgment in Inferior Courts is not allowable. *Sed non allocat.* it is good enough ſetting out the Plaint levied; but he ought not to begin at the Judgment. *Ideo conſideratum fuit.*

2. The Execution in the Hundred-Court is by *Diſtringas*, not by *Levari fac. Sed non allocatus* where the Books cited on the other ſide ſpeak of a *Diſtringas*, it is intended of a *Levari fac.* for a *Diſtringas*, and ſo *in infinitum*, would be endleſs in an Execution.

3. The Traverſe is not good. Iſſue upon it would make a Jeofail; for he had taken Execution before the delivery of the Precept to him after the *Teſte*, this had been Good. Therefore the Traverſe ought to have been before the *Teſte* or after the Return; *ſed non allocatur*, for the Traverſe is to the Prejudice of the Defendant himſelf, in taking it more narrow than he need, not to the Prejudice of the Plaintiff.

4. There is not any Statute that gives Coſts in this Caſe but 23 *H.* 8. and 4 *Jac.* 1. and theſe are where the Plaintiff is nonſuited after Appearance; and it doth not appear here that there was any Appearance. *Sed non alloc.* no Advantage ſhall be taken

taken of this upon Pleading, but by Writ of falſe Judgment, and the Judgment ſhall be intended good until it be avoided. 2 *Levinz.* 81. *Doe* and *Parmiter.*

Treſpaſs for breaking his Houſe and taking his Goods, againſt the Bailiff and Leſſor in Ejectment. The Bailiff pleads an *habere fac. Poſſeſſion.* and Warrant upon it, and ſo juſtifies. The Leſſor pleads *Non Culp.* The Plaintiff demurs upon the Plea of the Bailiff, becauſe he does not ſhew any Judgment upon which the *Habere fac. Poſſeſſion.* was founded. But *per Cur.* the Plea is good; for the Sheriff and his Bailiffs are bound to obey the King's Writs without enquiring after the Judgment. But if the Party himſelf had juſtified it, he ought to have pleaded the Judgment as well as the Writ; and Judgment *pro Def.* 3 *Levinz.* 20. *Cotes* and *Nuctholl.*

Treſpaſs *vi & armis* in the County Palatine-Court of *Lancaſter.* The Defendant pleads in in Bar a recovery for the ſame Treſpaſs in a Court-Baron, upon which the Plaintiff demurs. And *Wild* Chief Juſtice of the Aſſize at *Lancaſter*, on adjournment to his Chamber, held this pleadable in Bar. 6 *Rep.* 45. a. *contra*; and 5 *Rep.* 62. a. is not pleadable in Abatement: But Judgment after was given *pro Quer.* For Treſpaſs *vi & armis* lies not in Inferior Courts; and therefore the Judgment there, if it be *vi & armis* is void, if not *vi & armis* it is not the ſame Treſpaſs. But he held *ut ſupra*, That Judgment in an Inferior Court is pleadable in Bar in a Superior Court; and he alſo held it pleadable in Abatement, if it be for the ſame thing. 2 *Levinz.* 93. *Atkinſon* and *Woodbarr.*

As for Juſtification for breaking open an Houſe, the Sheriff upon a *Fi. Fac.* in caſe of a Subject, cannot break open the Houſe of any Man to do Execution;

xecution; and a Diverſity was taken and allowed *r Cur.*

When an Execution is lawfully commenced, here the Sheriff may break open an Houſe. *Aliter* hen it is Legally commenced, as when the Door open and they enter lawfully into the Houſe, then may break open inner Doors, which he might ve prevented if he had lockt the Door againſt the ntry of the Sheriff. *Palmer* 52. *White* and *ilſhire.*

Treſpaſs for taking of his Cattle. The Defendnt juſtifies by Virtue of an Execution in an ction of Treſpaſs brought in an Hundred-Court. he Plaintiff demurred.

1. The Inferior Court, not being of Record, nnot hold Plea of a Treſpaſs *Quare vi & armis, contra pacem. Sed non alloc.* For Treſpaſſes are quently brought there, and the Plaintiff may clare either *vi & armis*, or *contra pacem.*

2. The Defendant reciting the Proceedings bev ſaith, *Taliter Proceſſum fuit*; whereas he ght to ſet forth particularly all that was done, cauſe not being in a Court of Record, the Proedings may be denied and tried by a Jury: But Court inclined it was pleaded well enough, and t it was the ſafeſt way to prevent Miſtakes. But he Plaintiff had replied *de injuria ſua propria*, t had traverſed all the Proceedings. 2 *Mod.* 2. *Lane* and *Robinſon. Vide* as to the *Taliter ceſſum fuit*, 2 *Mod.* 195.

CAP.

CAP. XVIII.

Of Juſtifications in General, and Diſcontinuance by reaſon of ſome Omiſſion in the Plea.

THE Defendant ought to anſwer and make his Juſtification in the ſame manner as the Plaintiff declares againſt him. The Plaintiff declares that the Defendant *intravit & fregit clauſum ſuum*, and drove away his Cattle. The Defendant juſtifies *quoad intrationem effugationem*; and ſaith nothing *ad fractionem*; therefore it's not a good Juſtification. 1 *Bulſtr.* 64. *Prance* verſus *Tuckle.*

Treſpaſs brought for breaking a Ship and taking away the Sails. The Defendant Juſtifies by Warrant out of the Admiralty, by which he entred the Ship and took away the Sails. *Obj.* The breaking is not anſwered. But *per Cur.* it's good enough; for the Entry is a breaking in the Law. *Latch. p.* 188. *Creamer* and *Toakely.*

Treſpaſs for Aſſault, Wounding, Taking and Impriſoning. The Defendant as to the Aſſault and Wounding pleads *Non Culp.* and as to the Caption and Impriſonment, he Juſtifies. *Per Cur.* here are ſeveral Aſſaults; one in the Wounding, and one in the Taking; and in the Juſtification he hath left out the Aſſault. Upon Demurrer the Plea is ill, and all diſcontinued. 2 *Bulſtr.* 335. *Wilſon* and *Dodd.* 4 *Rep.* 62. *Harlakenden's* Caſe. 1 *Rolls Rep.* 135. *meſme caſe.* 1 *Rolls Rep.* 176. *vide Def. quoad part. pleads non culp.* and *quoad* other (but omits ſome, as the Treſpaſs *de arboribus*) juſtifies

juſtifies and demurrer joined, all is diſcontinued. 4 *Rep.* 62. *Harlakenden's* Caſe.

Treſpaſs for entring his Cloſe and tearing his Planks. The Defendant juſtifies by Force of a Cuſtom, That all the Inhabitants of *N.* time out of memory, *&c.* have uſed to waſh their Cloaths in the ſaid Cloſe, and beat the Cloth upon the ſaid Planks, and demurs; and adjudged againſt the Defendant, for that no anſwer is made to the tearing the Planks. *Coke* doubted if the Cuſtom be good. And yet the Inhabitants may preſcribe to have a Way to Church, but not to have Common. 1 *Rolls Rep.* 216. *Bawles* and *Norris.*

Treſpaſs for chaſing of his Sheep, Hogs and Oxen. The Defendant ſaith, as to the Hogs Not Guilty; and for all the reſt of the Treſpaſs, except the Oxen, he juſtifies, and ſaith nothing of the Oxen. And at *Niſi prius* found *pro Def.* the Defendant had Judgment; for this Omiſſion is but a Diſcontinuance of this Part of the Action of Treſpaſs only for them, and the Verdict ſhall ſtand good for the Reſidue *per Stat.* 32 *H.* 8. and 18 *Eliz.* which aid Diſcontinuances. 2 *Rolls Rep.* 61. *Jennings* and *Plaiſter.*

By *Chamberlaine*, Juſtice, in Demurrer Diſcontinuance of Part is Diſcontinuance of all; but otherwiſe when they plead to Iſſue in Treſpaſs. *Rolls Rep. p.* 390. *Bray* and *Fiſher.*

Action is brought for Treſpaſs *cum equis, bobus, vaccis,* &c. and he juſtifies for two Horſes, and ſpeaks nothing of the Reſidue. It's an ill Plea. *Cro. Jac. p.* 27. Sir *J. Thornel* verſus *Laſſells.*

Treſpaſs of Aſſault, Battery and Impriſonment and the Defendant paid a Fine. The Defendant juſtifies the Impriſonment by a Warrant whereby he took the Defendant in Execution till he paid; and to the reſt pleads Not Guilty; and not anſwering to the Fine, which ſeemed to be a

diſtinct Treſpaſs, not depending on the Execution; it had been ill, but that it was held to be within the Not Guilty pleaded to all the reſt. *Cramp* and *How* cited in 1 *Keb.* 205. *Prideux* Caſe.

Not juſtifies for the whole time.

Treſpaſs is alledged to be 8 *May*, 43 *Eliz.* with a *Continuando* unto 25 *June*; and the Defendant juſtifies from the 8th of *May* unto the aforeſaid 20th Day of *June*, and ſo he ſpeaks nothing of the four laſt Days. *Cro. Jac. p.* 27. Sir *J. Thornell* verſus *Laſſells.*

Treſpaſs of Aſſault, Battery and Impriſonment *ultimo die Octob.* 6 *Car.* The Defendant juſtifies That 13 *Aug.* 6 *Car.* by Warrant from the Sheriff on *Supplicavit* out of Chancery he arreſted the Plaintiff 21 *Sept.* The Plaintiff confeſſeth the Writ, Warrant and Arreſt the 21th of *September* and ſhews he found Sureties, and that the Defendant *poſtea* (*viz.*) *prædict. primo die Octob.* 6 *Car.* aſſaulted and impriſoned him, *&c. Concil.* *Quer.* moved, That the Plea was not good, becauſe he doth not anſwer the time in the Declaration, *viz. ultimo die Octob.* neither by Anſwer nor by Traverſe. But *per Cur.* the Juſtification being by an Act in the ſame County, and juſtifying the Time in the Declaration, although it doth not agree with it in the Day; but concludes *quæ ead. tranſgreſſio* is good enough. *Cro. Car.* 21 *Tyler* and *Wall.*

CA

CAP. XIX.

I come now to ſpeak of other Pleadings and Bars in Treſpaſs, having handled the nice Title of Juſtifications and Excuſes at large; and they are by Concord, Arbitrament, Amends tendred, &c. and the proper Pleadings thereon; with the Reference to the particular Forms of Pleading that are uſeful.

Bar per Concord.

BAR al novel Aſſignment, quant al part non culp. quant al reſidue Def. pleads Concord. Winch. Entr. 1075.

Bar al novel Aſſignment, que le Plaintiff per Agreement receive Satisfaction pur touts Treſpaſſes fait devant temps ſpecifie en le Count, & traverſe ſon eſteant culp. d'aſcun Treſpaſs puis. Replic. proteſtando nul tiel concord, pur Plea le Plaintiff maintain ſon Count. Winch. Entr. 1076.

Plead que un des Defendants payed al quer. 20 s. in pleine Satisfaction & Diſcharge de Treſpaſs pur luy meſme & les deux auters. Winch. Entr. p. 1111.

Concord per mediationem amicorum pleaded, & quod Def. daret quer. lagenam vini quater. Ra. Entr. 627.

Quod tranſ. fact. fuit per Def. & G. inter quel G. & Def. habebatur concordia quod, &c.

Quod Def. deliberavit oblig. al. un auter & fecit alia pro quer. in ſatisfact. Treſpaſs. Tompſ. 301.

The Defendant pleaded an exchange between him and the Plaintiff of Lands which were adjoining, and that upon the Exchange *concordatum fuit* between the Plaintiff and Defendant, That the Plaintiff ſhould make the Fences, *&c.* This Agreement cannot be a Bar in this Action; but the Defendant is put to his Action on the Caſe on the Promiſe. *Cro. Eliz. p.* 709. Sir *Andrew Nowell* verſus *Smith.*

The Defendant pleads Concord, that he ſhould pay Money to the Plaintiff, and make certain Windows for him, and ſhews that he paid the Money accordingly, but ſays nothing of the Windows. Ill Plea; for the Concord is entire, and he had not alledged Performance of the whole, and he hath no remedy to force him. *Plowd. Com. fo.* 11. b.

Accord with Satisfaction is a good Plea in perſonal Actions where Damages are only to be recovered. 4 *Rep.* 1. 6 *Rep.* 44. in *Blake*'s Caſe.

Concord Executory no Bar in Treſpaſs; for a Tort is done and not denied, and ought to be anſwered with a Recompence, and the Concord Executory is no Recompence in Fact.

In Treſpaſs the Defendant ſaith it was agreed between the Plaintiff and him, That whereas there was a Debate between the Plaintiff and the Lord *Gray*, that if the Defendant did his Endeavour to agree them, that then, *&c.* and ſaith he did his Endeavour ſo that they are agreed. It was held no Plea. If he ſaid, He did his Endeavour at his own Charges, it had been good; for there is a recompence then. *Plowd. Com.* 5. b. 6. a. in *Reniger* and *Fogaſſa.*

The Defendant pleads an Accord to give Judgment in the Sheriff's Court, and pay 50*s.* and that he gave the Judgment and tendered the 50*s.* The Plaintiff demurred, and Judgment

the Plaintiff. 2 *Keb.* 534. *Hall* and *Seabright.*

The Defendant pleads a Concord to pay 3 *l.* and a Promiſe to pay the Plaintiff's Bill when delivered; and avers that he had paid the 3 *l.* and did then and there promiſe to pay, *&c. Per Cur.* this Promiſe or any thing in Action is no Accord as to pay and releaſe, becauſe on refuſal the Party cannot compell the Releaſe; but this might be pleaded by way of Diſcharge, but not of Bar. 2 *Keb. p.* 690. *Cock* againſt *Hunny Church. Raym.* 203. *mesme Caſe.*

Narr. de clauſo fract. & cuniculis occiſis. Accord pleaded in Bar ove le warrener & accept denar. ſolut. per quer. Tompſ. 387.

The Defendant pleads Concord in Bar, but ſaith not with Satisfaction; and as it was pleaded, it was not ſaid to be for the ſame Treſpaſs. The Plea is ill, if the Plaintiff had demurred to it; but after Verdict it is aided by Stat. 32 *H.* 8. of Iſſues miſjoined. *Cro. Eliz.* 778. *Dighton* and *Bartholomew.*

The Accord muſt be in the lifetime of him that did the Wrong.

If the Accord be done by a Stranger, it is good. *Dier* 356. if the Party to whom the Wrong was done did accept it. 9 *Co. Rep.* 79.

If the Treſpaſs be done by many, and the Accord by but one, 'tis a good Bar for the reſt. 9 *Rep.* 79.

Tender of Money without Payment of it will not be a good Plea. Old *N. B.* 102.

If the Parents or Friends agree with him that hath the Wrong for the Amends, and they perform and he accept it, this is as good as if it were by the Parties themſelves. *Fitz. Bar.* 106.

By Arbitrament.

The Defendant pleads an Arbitrament in Bar; that the Defendant ſhould pay to the Plaintiff 20 *l.* The Plaintiff demurs, becauſe he doth not alledge a Place where the Submiſſion was, and doth not alledge Performance of the Arbitrament, and doth not anſwer to the *vi & armis*, and adjudged an ill Plea. *Cro. Eliz. p.* 66. *Hare* and *Gorge.*

Treſpaſs may be barred by pleading of a former Arbitrament with a ſpecial Averment. *Hobart. p.* 50.

Arbitrament pleaded in Bar, and traverſe *que eſt culpable puis l'Arbitrament fait.* Tompſ. 139. *Repl. & iſſue ſur traverſe.*

By Amends.

In all Actions *quare clauſum fregit*, if the Defendant do tender ſufficient Amends before the Action brought, and in his Plea to the Action diſclaim to make any Title or Claim to the Land and the Treſpaſs be by Negligence or Involuntary by this (being proved) the Plaintiff will be Barred *Stat.* 21 *Jac. c.* 16.

If a Man bring Action of Treſpaſs for taking away his Beaſts or other Goods, tender of Amends ſufficient before the Action brought, is no Bar becauſe he that tendered the Amends is not Owner of the Goods, but a Treſpaſſer, whom the Law favours not. *Aliter* in caſe of Diſtreſs for Rent or Damage-Feſant. *Co.* 2 *Inſt.* 107. *vide Stat.* 21 *Jac. c.* 13.

If a Man take my Sheep Damage-Feſant, and I tender him ſufficient Amends before the Impounding, and he refuſe this and drive the Beaſts

re the Pound, he is a Treſpaſſer *ab initio.* Tender after the Diſtreſs and before the Impounding makes the Detainer tortious. 2 *Rolls Abr.* 561. 8 *Rep.* 147. Six Carpenters Caſe.

Tender of Amends is a good Plea in Bar for the negligent Eſcape of Beaſts into the Land of another, but not for a voluntary Treſpaſs. 2 *Rolls Abr.* 570. *Walgrave's* Caſe.

Treſpaſs was 4 *March.* Defendant pleads the Treſpaſs was involuntary, *& quod poſt tranſgreſſionem factam, ſcil.* 24 *March* he tendred amends for the Treſpaſs, and doth not ſay, before the Original brought, as by *Stat.* 21 *Jac. c.* 26. It's ill Plea. *Litt. Rep.* 152. *Turnold's* Caſe.

The Defendant may plead the Treſpaſs was involuntary, and diſclaim in the Title without pleading the Statute of 21 *Jac.* which is a general Statute. *Litt. Rep.* 355. *Jennings* and *Coſins.*

Bar quod Def. obtulit quer. emendas pro Tranſgreſſ, quas quer. recuſavit. Wilk. 287. 1 *Br.* 167. 2 Browne 278.

Quod Def. obtulit quer. modium tritici pro tranſgreſſ. involuntaria fact. in terris de novo aſſignat. cum averijs. Repl. proteſtando quod emende non fuer. ſufficien. pro placito non obtulit. 3 Br. 482. Tompl. 360, 361.

Iſſue de 1 s. *oblat. pro emendis ante* Original *proſecut.* 3 Br. 482.

Tender of Amends pleaded in Involuntary Treſpaſs, *& modus placitandi.* 1 Browne 360.

Tender des Amends poſt Treſpaſs fact. pleaded, & modus placitandi. 1 Browne 360, 361. Tompſ. 304. *Repl. quod non obtulit. Rej. quod obtulit, & Iſſue. Repl. quod Def. obtulit quer.* 8 s. *in emendis pro Tranſgr. fact. in alio loco, & traverſe quod obtulit pro Tranſgreſſ. in loco de novo Aſſignat.* Hern. 620, 720.

Treſpaſs in B. R. Bar per tender des Amends. Repl. que devant tender le Def. fuit arreſted per Latitat. Hern. 732.

Quod Def. dedit al A. 12 d. *ſolvend. Quer. in ſatisfactione Tranſgr. quas querens recepit. Repl. quod non recepit* 12 d. *in ſatisfactione Tranſgr.* Aſh. 452. 2 Browne 258.

Def. pleads tender des Amends, & diſclamat habere aliquem titulum ſive clam. in tenementis, &c. *Repl. quod tender fuit fait alio loco quam in terris de novo aſſignat. & traverſe,* &c. Winch. Entr. 1109.

Tender des Amends, demur inde. Co. Entr. 602.

The Defendant pleads Tender of 2 *s.* 6 *d.* and averred this was ſufficient *per Stat.* 21 *Jac.* and Iſſue upon the Sufficiency of the Amends. The Defendant began the Evidence to prove it ſufficient, as to ſhew the Treſpaſs and prove the Tender, *&c.* The Plaintiff was not permitted to ſhew or prove more Treſpaſſes than for that he hath declared; and that that the Plaintiff ſets forth ſhall be the Treſpaſs, if they vary. At a Trial before Judge *Vernon.*

The Defendant pleads *ſecundum Stat.* 21 *Jac.* That he tender'd Amends before the Action brought, *viz.* 2 *Oct.* 7 *Car.* The Plaintiff replies, That before ſuch Tender he ſued a *Latitat Teſte* the laſt Day of *Trinity*-Term before, and upon that procured the Defendant to be arreſted, intending to declare in Treſpaſs. *Per Cur.* this Tender came too late. For as well as a Tender after an Original Writ comes too late: So after an Arreſt upon a *Latitat,* the Tender by the Statute is intended to be immediately after the Treſpaſs and before the Suit commenced. *Cro. Car.* 264. *Watts* and *Baker.*

Plead

Plead 10*s.* tender'd. The Treſpaſs was laid to be in *May*, *July*, *October*. The Plaintiff muſt prove the ſeveral Treſpaſſes and ſeveral Days *prout* in the Declaration. It had been better to have laid the Treſpaſs ſuch a Day with a *Continuando*.

Bar by Licence.

A Licence to enter and occupy Land from ſuch a Day to ſuch a time, is a Leaſe, and ſhould be ſo pleaded, and not by way of Licence. *Plowd. Com.* 542. 4 *H.* 7. 1. in *Paramour*'s Caſe. *Sid. p.* 428. *Mod. Rep.* 14. 2 *Keb.* 561. *Hall* and *Seabright*

If the Defendant in Treſpaſs pleads a Licence, he ought to traverſe all Treſpaſſes before and after; if he pleads a Releaſe, he muſt traverſe all Treſpaſſes made after; if a Feoffment, all Treſpaſſes made before. *Hob. p.* 104. *Digby*'s Caſe.

One juſtifies to the ſame day by a Licence, yet he ought to take a Traverſe. *Siderf. p.* 234. *Ellyot*'s Caſe.

If any miſuſe a Licence given by the Law, he ſhall be a Treſpaſſer *ab initio*. *Aliter* of a Licence of the Party. 8 *Rep.* 146. Six Carpenters Caſe.

The Defendant juſtifies by Licence ſuch a Day, which was after the Treſpaſs, it's ill. As Treſpaſs *quare Clauſum fregit*, The Defendant pleads, *ante tempus quo*, &c. the Treſpaſs is ſuppoſed, *viz.* ſuch a Day, which was the Day after the Treſpaſs, the Plaintiff licenſed, *&c.* The Plea is ill in Subſtance on General Demurrer. *Sid. p.* 428. *Hall* and *Seabright*.

One may juſtify the entring into an Houſe to demand Money owing to him, if the Maſter be there; but not by Licence of a Servant. *Cro. Eliz.* 876. *Holdringſhaw* and *Ragg*.

Treſpaſs

Treſpaſs for breaking his Houſe and taking away a Corſlet, *&c.* of the Plaintiff's. The Defendant pleads, Long time before *J. P.* was ſeized of the ſaid Corſlet, *&c.* as of his own Goods remaining in the Plaintiff's Houſe, and that he ſold them to the Defendant, and he *tempore quo*, &c. came to the Plaintiff's Houſe and demanded them, and the Plaintiff's Wife licenſed him to enter and take them. *Per Cur.* the Plaintiff ſhall recover as to the entring into the Houſe, but not as to the Goods; and the Wife's Licence to enter is not good. *Cro. Eliz.* 245. *Tayler* and *Fiſher*.

Treſpaſs for eating his Hay with his Cattle. The Defendant juſtifies, for that Sir *W. P.* was ſeized, *&c.* and lett the Land to him, and he put in his Beaſts, *&c.* The Plaintiff replies, before that Leaſe made, Sir *W. P.* licenſed him to put in his Hay upon the Land, till he might conveniently ſell it. The Defendant demurrs, Judgment was againſt the Plaintiff. (He had two Years time to remove it.) and *Dodderidge* gave an excellent Reaſon. The Owner of the Hay ought to preſerve it at his Peril; for by this Licence the Owner of the Land doth not exclude himſelf from taking the Profits of the Land. It was alſo agreed in this Caſe, where a Man claims by Licence which is not of Pleaſure but Profit, it's not revocable; and where the Authority is limited to one certain time, it's not revocable before the time expired, and therefore the making of the Leaſe is no Revocation; and there ought to have been Notice given the Plaintiff of the Leaſe. 2 *Roll's Rep.* 14[illegible] *Popham's Rep.* 151. *Webb* and *Paternoſter*.

Juſtification for that the Plaintiff's Bailiff gave him Licence to go that way with his Cattle, and good. For though a Bailiff cannot give Licence to do a Treſpaſs, as to cut down Trees, nor to accept Amends for a Treſpaſs, as 5 *Rep.* 76. [illegible]

he may licenſe one to go over his Maſter's Land for Recompence. *Crok. Jac.* 377. *Wingfield* and *Bell.*

If the Defendant in Treſpaſs plead Not Guilty, and gives Licence in Evidence, this Evidence doth not warrant the Iſſue. 25 *H.* 8. *Bro.* 81, cited in *Plowd.* 14. a.

The Defendant juſtified by Licence for himſelf and his Wife to inhabit. The Plaintiff replies, *non licentiavit* the Husband and Wife *modo & forma.* and it's found *non dedit licentiam modo & forma.* If it had been found the Plaintiff did licenſe to Baron and Feme, it had been good; but not in the negative: For the Defendant's Plea may be true. 3 *Keb.* 755, 761. *Jepſon* and *Jackſon. Quære.* It ſeems to be a Diſtinction without a Difference. But this Caſe is more ſolidly reported, 1 *Levinz.* 194.

Treſpaſs for entring into his Houſe, and continuing Poſſeſſion for three Years, againſt Baron and Feme. The Defendant pleads *Non culp. quoad* two Years, and *quoad* the third a Licence for the Husband to enter with his Wife and Servants, and there to inhabit. Iſſue *Non dedit Licentiam* to the Husband and Wife *modo & forma prout*; both Iſſues found *pro Quer.* and intire Damages in *B. C.* Error is brought and aſſigned, That the ſecond Iſſue is impertinent and void; for when the Defendant pleads Licence to him to enter with his Wife, *&c.* the Replication *quod non dedit Licentiam* to the Husband and Wife is foreign, and does not meet with the Plea: For he might give Licence to the Husband to enter with his Wife, in which caſe the Licence is given to the Husband only; and yet he gives not Licence to the Husband and Wife; and it is a material Difference, for it amounts to a Leaſe, and the Judgment was reverſed. 2 *Levinz.* 194. *Jepſon* and *Jackſon.*

If

If to a Treſpaſs *de clauſo fracto* 11 *March*, the Defendant pleads a Licence 5 *Maij*, there he may and muſt traverſe *abſque hoc quod ſit culpab' ante Licentiam ſibi conceſſam*; and the Plaintiff may take Iſſue upon the Licence or upon the Traverſe. *Kel.* 340. *Hob.* 104.

Bar by the Statute of Limitations.

All Actions of Treſpaſs of Aſſault, Battery, Wounding and Impriſonment, ſhall be commenced within four Years after the cauſe of Suit, and not after.

One never pleads to the *vi & armis*, where he begins with the Statute of Limitations.

The Plea is good, though he doth not ſhew the Continuances of his Proceedings, eſpecially upon Appearance. *Stiles Rep.* 379. *Whitehead* and *Buckland.* and *p.* 401, 402, 403.

To Aſſault, Battery and Impriſonment the Defendant pleaded the Statute of Limitations. The Plaintiff replies and ſets forth a Writ againſt the Defendant; but it doth not appear there are Continuances down till the bringing this Action; yet good. 2 *Keb.* 188, 230. *Brown* and *Tripp.*

W. brought Treſpaſs by Original Writ. The Defendant pleads the Statute. The Plaintiff Replies, He took out an Original Writ within the time limited by the Statute. *Et de hoc*, &c. for they have tied up the Defendant that he cannot rejoin. The Defendant demurs, becauſe he ſhews not what Writ he ſued forth. *Per Cur.* he need not; if the Writ be not good he may have a Writ of Error. But the Concluſion is not good, for they have tied up the Defendant that he cannot rejoin. *Stiles Rep.* 379, 401. *Whitehead's* Caſe. But *per Roll*, the ſetting forth the Original by the Defendant, and to conclude he is not guilty within ſix Years from

from that time is not good: he ought to plead Not Guilty within ſix Years before the Original ſued forth. *Ibid.*

Treſpaſs of Aſſault and Battery. The Defendant pleads the Statute of Limitations. The Plaintiff replies within four Years he took out a *Latitat* and continued it down *pro cauſa prædicta. Et hoc petit quod inquiratur*, &c. The Defendant traverſing the Iſſuing of the *Latitat.*, *pro cauſa prædicta infra* the four Years; it was moved in arreſt of Judgment, that this ſhould be tried by the Record. *Sed non allocatur*, Iſſue being as well on the Time as the Iſſuing of the *Latitat:* But on the Iſſuing of the *Latitat* alone, it muſt be ſaid, *prout patet per Recordum.* 2 *Keb.* 680. *Cragnell* verſus *Robinſon.*

The Defendant pleaded the Statute of Limitations. The Plaintiff replies, In the Uſurpers Time the King's Courts were ſhut up, ſo that he could not proſecute by Writ. Judgment *pro Def.* 1 *Keb.* 157. *Weller* and *Prideaux*, 204.

Replic' al Stat' de Limitations (*viz.*) *Lat'* proſecuted and continued *uſq; exhibitionem Billæ.* Tompſ. 334.

Per Releaſe.

If the Defendant in Treſpaſs pleads a Releaſe, he muſt traverſe all Treſpaſſes done after: If a Feoffment, all done before, If a Licence, all done before and after. *Hob. p.* 104. *Digby's* Caſe.

In Treſpaſs for riding an Horſe. The Defendant pleads, That the Plaintiff *poſtea, ſcilt.* ſuch a day *luy exoneravit del Treſpaſs.* This is no Plea to a Treſpaſs in no Caſe, without pleading a ſpecial Accord: But in Action *ſur Caſe ſur Aſſumpſit* it may, if it be before breach of Pro-

If

miſe. *Siderfin p.* 293. *Tr.* 18 *Car.* 2. *Weſtlake's* Caſe. 2 *Keb.* 69. *meſme caſe.*

If two commit a Treſpaſs, and a Releaſe is made to one, provided that the other ſhall not take Benefit of this Releaſe, it's a void Proviſo. *Litt. Rep.* 191.

In Treſpaſs, the Defendant as a Copy-holder, claims to have in the Land of his Lord Common by Preſcription. The Plaintiff pleads a Releaſe of this made unto him by the Defendant. The Plaintiff pleads to this, *Ne releſſa pas.* It's not a good Plea: for where one is Party to the Deed, there he ought to anſwer directly, *non eſt factum. Aliter* if he were a Stranger to the Deed, there he may well plead *ne releſſa pas*, or *riens paſſa per le fait*; and ſo by this means the Validity of the Deed will come in queſtion, and the Books agree in this difference. 2 *Bulſt.* 55. *Richardſon* verſus *Piſtell.*

The Defendant in Treſpaſs pleads a Releaſe of all Actions in *B.* and upon *Oyer* it was entred *in hæc Verba*; and it appears that ſome things were excepted out of the Releaſe. The Plaintiff had Judgment on Demurrer: For it ſhall not be intended the ſame. Releaſe. *Palmer* 411. *Marjoram* and *Avis.*

Al Count port per Executors pour biens priſes hors de lour Poſſeſſion. Def. pleads al part non culp. & al auter part le Releaſe d'un Executor. Repl. que Releaſe fuit d'auter biens, & non culp. pleaded al eux. Winch. Entr. 1119.

Quod Quer. in conſideratione relaxationis ſibi per Def. relaxavit dicto Def. omnes actiones & tranſgreſſiones per dict' Def. quer' illat. 2 Browne 145, 149.

Releaſe al Treſpaſs pleaded. Tomp. 335.

To Aſſault, *&c.* the Defendant pleads, Such a Day and Place the Plaintiff *exoneravit, relaxavit*

&

& quiete clamavit to the Defendant, all Actions. It ſhould have been, He releaſed *per Scriptum*. *Siderfin* 175. *Bleek* and *Grove*.

Pur Neceſſity. Vide ſupra.

Pur bien Publique. Vide ſupra.

It is not lawful to do a Tort though it ſound to the Profit of another. If a Man ſee the Beaſts of his Neighbour in another Man's Cloſe Damage-Feſant, it's not lawful for him to chaſe them out; and if he do, the Owner ſhall have Treſpaſs. *Dier fo.* 36. *Pl.* 38.

Parſon brought Treſpaſs for taking away Corn. The Defendant pleads, That the Corn was ſevered from, *&c.* and was in jeopardy of being deſtroyed, *&c.* for which the Defendant carries them to the Plaintiff's Barn. *Dier fo.* 36. *Pl.* 39. no Plea.

Quod Def. cepit prad. peciam ſubboſci vocat. a Pole, *extra Manus Quer. & deliberavit Conſtabulario pro meliori cuſtodia pacis. Repl. de ſon tort.* 1 Browne 378.

By Default or Act of the Plaintiff himſelf.

Default of Incloſures, *vide* Bars des Incloſures.

The Defendant pleads, That in the Cloſe where the Plaintiff ſuppoſeth the Treſpaſs, there is, and time out of Mind was, a Foot-way for all People *in, per & trans* the ſaid Cloſe unto ſuch a Place; and that the Plaintiff ſuch a day plowed up the ſaid Foot-way and ſowed it, and near the ancient Foot-way he *reliquit & aſſignavit* another Foot-way, *&c.* and the Defendant went this new Way. A good Bar and Excuſe; for the Plaintiff did the firſt Wrong, and aſſigned a new Way, and contrary

to

to his own Agreement he ſhall not puniſh the Defendant. He ſaith the Plaintiff *aſſignavit viam*, and ſaith not to whom, yet it's good. *Quod eſt commune omnibus* may not be aſſigned to any particular Perſon. *Yelv. p.* 141. *Horn* and *Wildlake*.

I may juſtify the Entry into another Man's Land, to throw down a Nuſance; as Water runs by the Land of *M.* and *M.* ſtops the Water-Courſe, ſo that it ſurrounds my Land; he ſhall not have an Action againſt me if I enter into his Cloſe to abate this. 2 *Rolls Abr.* 565. 9.

If a Man wrongfully impriſon me in his Houſe, I may juſtify the breaking the Windows and Houſe to get out. 2 *Rolls Abr.* 566.

If I have an heap of Corn or Money, and another comes and caſts his Corn or Money into my Heap, I may juſtifie the carrying away the whole. *Cro. Jac.* 366. *Ward* and *Ayre*.

The Plaintiff and Defendant being at play, the Plaintiff thruſt his Money into the Defendant's Heap and mixed it, and the Defendant kept it all. The Plaintiff brought Treſpaſs *quod cumulum pecuniæ* containing five Marks, *cepit*, &c. *Per Cur.* the Action lies not. 2 *Bulſtr.* 323.

The Plaintiff pretending Title to certain Hay which the Defendant had ſtanding in certain Land, to be more ſure to have the Action paſs for him, took other Hay of his own and mixed it with the Defendant's Hay; after which the Defendant carried away both the one and the other. *Per Cur.* the Defendant ſhall not be guilty for any part of the Hay. If a Man take my Garment and embroyder it with Silk, or Gold, *&c.* I may take back my Garment: But if I take the Silk from you, and with this face my Garment, you ſhall not take my Garment for your Silk which is on it; but are put to an Action for taking the Silk from you. So here, if the Plaintiff had taken the

Defendant's

Defendant's Hay, and carried it to his Houſe, and there intermixed it with the Plaintiff's Hay, there the Defendant cannot take back his Hay, but muſt ſue the Plaintiff for taking his Hay. This difference was agreed *per totam Cur.* If a Goldſmith be melting of Gold in a Pot, and I will caſt my Gold into the Pot, and it's melted with the other, I have no remedy for my Gold, but have loſt it. *Pop. Rep. pl.* 38.

One Tenant in Common may not juſtify the entring into the ſeveral Land of another, to take a thing which is in common. 2 *Rolls Abr.* 566. *Maſters* and *Polley.*

A Man leaves an Iron Bar in my Cloſe; in Treſpaſs for the taking this away, I may juſtify the taking and putting it into the Cloſe of the Plaintiff. 2 *Rolls. Abr.* 566. *Cole* and *Maunder.*

If one loads my Cart with his Corn, or puts his Coals into my Boat, I may detain them without being any Treſpaſſer, until he bring his Action of Detinue or Replevin: So if one puts a Saddle on my Horſe. 1 *Bulſtr. p.* 96.

Treſpaſs for Chaſing. The Defendant juſtifies Damage-Feſant in his Free-hold. The Plaintiff replies, and ſhews a Grant of the Common in the place where, *&c.* by the Defendant; and how the Defendant erected a Stack of Corn, and the Plaintiff put in his Beaſts to uſe the Common, and the Defendant chaſed them, *&c. Per Cur.* the chaſing is not lawful; and by ſuch means the Defendant ſhould defeat his own Grant. *Yelv. p,* 201. *Farmer's* Caſe. *Cro. Jac. p.* 271. *meſme Caſe.*

A. lett Land to *B.* for Life, and after letts this to *C.* for Years to commence after the Death of the Leſſee, and after *B.* ſows part of the Land and dies before ſeverance of the Corn, and after *C.* enters into the reſidue of the Land not ſown, and puts in his Cattle, and the Beaſts againſt his will eat

eat the Corn. The Executor ſhall have Action of Treſpaſs againſt him, and this ſhall not excuſe; for the Executor hath the Right to the Corn, and they muſt grow till a convenient time to be removed. 2 *Rolls Abr.* 568. *Pitts* and *Collybeare.*

Excuſe by Fraud.

One knowing Execution will be upon his Goods, procures *J. S.* by Covin to lay one of his Carts in his Yard, on purpoſe that the Bailiff might take it in Execution, ſo that he might have Action of Treſpaſs againſt him; and the Bailiff took it, and after he had knowledge thereof ſent it back; and yet *J. S.* brought Treſpaſs. *Per Ley* Chief Juſtice, the Bailiff may plead the Fraud in excuſe. 2 *Rolls Rep.* 393. *Groome* and *Groome.*

Bar by Pardon.

By ſhewing a Pardon by Act of Parliament is a good Plea. *Old Book of Entries* 596.

A *Continuando* from 20 *June* until 6 *Nov.* following; and upon Not Guilty, it was found *pro Quer.* and no entry of the Fine *quia pardonatur*; though the Act of Parliament pardoned but to 25 *Sept.* and ſo but part pardoned, yet no *Capiatur* was entred for the firſt Treſpaſs, *vi & armis* being pardoned, the *Continuando* (being as to the Conſumption of the Graſs) is for the Increaſe of Damages only. *Cro. Jac.* 207. *Strickland* and *Thorp.*

In what Caſes a Man may juſtify as incident to another thing.

If a Man bargain and ſell all his Trees growing on his Land, the Grantee may come upon the Land

Land to cut them down and carry them away. 2 *Rolls Abr.* 567. M.

If a Man grant to me to make a Trench in his Soil from ſuch a River unto my place to lay in a Pipe, *&c.* if my Pipe be ſtopped I may dig his Land for to amend the Pipe. So if I have ſuch a Pipe by Preſcription. 2 *Rolls Abr.* 567. *vide ſupra.*

Bar by an Action depending in another Court for the ſame Treſpaſs.

It is a good Plea, *Bro. Treſpaſs* 357. as that the Plaintiff hath Replevin depending in another Court for the ſame Treſpaſs, is a good Plea.

So to plead, after the Plaintiff hath declared, there is another Action depending in the Courts of *Weſtminſter* for the ſame Matter: But that there is an Action in an inferior Court is not a good Plea unleſs Judgment be given. 5 *Rep.* 61.

By Recovery en auter Action.

Recovery in an Action of Treſpaſs at Common Law, is a good Bar in an Action of Treſpaſs on the Statute. *Vide prius cap.* 40.

If Baylee of Goods bring Treſpaſs, and the Baylor brings another Action of Treſpaſs, he which firſt recovers ſhall ouſt the other of his Action, it ſhall be a good Bar to the other. 2 *Rolls Abr.* 569. 5 *H.* 4. 2.

Where Damages for Goods are recovered againſt *J. S. J. S.* ſhall have after Treſpaſs for the Goods. 1 *Keb.* 43.

Aſſault and Battery againſt *W.* for Battery committed by him *ſimul cum* J. and Judgment againſt him and Damages levied; and after another Action is brought againſt J. and he is found Guilty, and

good: but if he will take dvantage of the firſt Recovery, he ought to ſhew it in pleading. *Litt. Rep. fo.* 37. *Watſon's* Caſe. *Hob.* 66.

Bar by recovery by the ſame Plaintiff in *B. R.* for the ſame Battery, againſt another who joins in the Battery. *Repl. nul tiel Record. Litt.* 56. *Garton.*

Treſpaſs by the Plaintiff for aſſaulting the Wife 12 *Apr.* ---75. The Defendant pleads former Recovery in Treſpaſs 27 *Apr.* ---75. by the Plaintiff and his Wife, *quæ eſt ead.* &c. *abſque hoc* that he is guilty of the ſaid Treſpaſs on 12 *Apr.* or at any time before or after the ſaid 27 *Apr.* ſeems not good: But had the Treſpaſs been laid 29 *Apr.* or at any time after 27 *Apr.* had been ſufficient; becauſe the Plaintiff cannot give evidence precedent to the Day of the Recovery, but ſubſequent until the Day of the Declaration entred or Bail filed he may. 3 *Keb.* 568. *Kidder* and *Wall.*

Note, Diverſity, where the Demand and Recovery is of a thing certain, and where of a thing uncertain; as in Trover for certain Goods in particular. The Defendant pleads that the Plaintiff had brought ſuch Action againſt *J. S.* for the ſame Goods before this Action brought, in which Suit he ſo far proſecuted *J. S.* that he had Judgment and Execution againſt him; and avers, That the Goods comprehended in both Actions are the ſame Goods; a good Plea. Execution is not any Satisfaction: But where Treſpaſs is made by two, which reſts only in Damages, and the Plaintiff recover againſt one and had Execution, this is a good Bar againſt the other: Nay, the very Judgment is a ſufficient Bar; for *tranſit in rem Judicat.* and the thing uncertain is now altered into another Nature and made certain. So of Battery by diverſe, the firſt Recovery againſt one is a good Bar. *Yelv.*

p. 67.

p. 67. *Broom* and *Wootton*. 1 *Leon.* 19. *Lendall's* Caſe: *Cro. Jac.* 73. *Browne's* Caſe. 3 *Leon.* 122.

But if Moneys are paid in Satisfaction of a Treſpaſs, it's a good Bar. 2 *Rolls Abr.* 569.

If one recover in Appeal of *Mayhem*, this ſhall not be a Bar in Treſpaſs for the Battery. 2 *Rolls Abr.* 570.

S. brought Treſpaſs againſt *C.* for breaking his Cloſe, and declares of a Treſpaſs in *Sommers Land* in *Tunbridge*. The Defendant pleaded, That heretofore he himſelf brought Aſſize of *Novel Diſſeiſin* againſt the now Plaintiff, and ſuppoſed himſelf to be diſſeiſed of his Free-hold in *Lee juxta Tunbridge*, and the Land *in quo*, &c. was put in view, *&c.* and avers, That the Land where, *&c.* and the Land put in view is one and the ſame. No Plea. But if the now Plaintiff, who was then Tenant, had pleaded to the Land put in view in Bar, and the Plaintiff in the Aſſize had recovered, now the Plaintiff in the Aſſize being Defendant in this Action, might well plead this Recovery in Bar: But in this caſe where the Tenant pleads *null tort null diſſeiſin*, he doth not expreſly plead to the Land put in view, but to the Suppoſal of the Plaintiff (*viz.*) *de libero tenemento in Lee juxta Tunbridge.* 1 *Leon.* 24. *Stacy* and *Carter.*

Tranſ. de Piſce capt. Bar per Recovery in primer Action. Repl. Def. cepit plures oves quam qui fuer ſpecific. in priori Actione. Rā. Entr. 655.

Replevin de 2 *Spadones* taken 28 *July.* 33 *Car.* 2. in two Acres of Land, and named them. The Defendant pleads, That *Trin.* 34. the Plaintiff brought other Action of Treſpaſs *quare clauſum fregit & 2 equos* of the Plaintiff *cepit & abduxit*, and alſo ſpoiled his Graſs, and received 40 *s.* Damage and 14 *l.* Coſts; and avers the *Spadones* in the Declaration, and the *Equos* in the former Action,

Action, and the taking are the ſame. The Plaintiff demurs generally. *Per Cur.* the Averment that the *Spadones* in the Declaration, and the *Equos* in the former Action may well be the ſame, for *Equus* is a general Word for all ſorts of Horſes. 2. It was argued, That the Recovery in Treſpaſs ſhall not be a Barr in this Action, which is for the ſame Cattle, the other only for Damages, which may be given for the taking only, and for the other Treſpaſſes, and not for the Value of the Cattle themſelves; and 40 *s.* is not ſuppoſed to be the value of two Horſes, and no Averment is here for what the Damages in the firſt Action were given; nor does it appear for what the 40 *s.* Damages were given, but only by ſuppoſal. 3 *Levinz.* 124. *Field* and *Tellicus*,

Plea by Judgment in Inferior Courts

Treſpaſs for taking the Plaintiff's Beaſts. The Defendant juſtifies, and pleads a Plaint levied in Debt in *Worceſter*-Court, and counts upon it that the Defendant being indebted to the Plaintiff *infra Juriſdict. promiſ.* &c. upon which *talit. proceſſum fuit*, that after, to wit, 2 *Oct.* 34 *Car.* 2. *conſiderat. fuit*, &c. and by Warrant upon this Judgment he juſtified. The Plaintiff replies, *de injuria ſua propria abſque tali cauſa, abſque hoc quod habetur aliquod tale Recordum*, &c. The Plea is ill: 1. He Pleads the Court held time out of memory, *&c.* before 2 *Jac.* 1. *coram Ballivis*, and then *coram Majore*, &c. and ſhews not any Grant for the Alteration of it; and then the Court held before the Mayor was without any Authority, and the Judgment void. 2. It is not ſhewed in the Plea that the Cauſe of Action aroſe within the Juriſdiction, and then the Judgment is *coram non Judice*, and void. It is true, in the Declaration ſet forth

forth in the Plea it is ſaid to be *infra juriſd. Cur.* but this is not ſufficient, for it is traverſable, and the Matter in the Declaration there is not traverſable here, but only that which is alledged in the Plea here. The Replication is ill for the double Traverſe; yet the Declaration being good and the Plea ill, Judgment *pro Quer.* 3 *Levinz.* 243. *Adney* and *Vernon.*

Treſpaſs for that the Defendant *ſimul cum*, &c. 17 *Apr.* 4 *Regis nunc*, &c. aſſaulted, beat, wounded and impriſoned him twelve Months. The Defendant *quoad vi & armis & vulnerat.* pleads *Non Culp. & quoad reſid. Tranſgreſſ. inſult. impriſonment & detention. in Priſone* he ſaid, St. *Edmund's Bury* is an ancient Borough, and that the Defendant *infra Juriſdict. Cur. de Recordo* of the ſaid Borough was indebted to the Defendant, and for the Recovery of it the Defendant *implacitaſſet illum in ead. Curia, & invenit pleg. ad proſequend. ſectam ſuam & ſuperinde taliter proceſſum fuit in eadem Cur.* that he had Judgment and Execution, which he delivered to the other Defendants in the *ſimul cum*, who *apud D. infra*, &c. *molliter manus impoſuit ſuper eum*, and arreſted him, *&c. Per Cur.* this ſhort way of pleading the Judgment in an inferior Court is good, though otherwiſe it has been formerly uſed. It was objected that the Plea was ill, becauſe in the *quoad reſid.* he had omitted the Battery, which makes a Diſcontinuance of the whole. But then it was anſwered, *quoad reſid. Tranſgreſſ. præd.* is a ſufficient Anſwer to all. 2. 3 *Levinz.* 404. *Patrick* and *Johnſon.*

CAP. XX.

Of Traverſes in Treſpaſs; wherein I ſhall firſt lay down ſome General Rules, and then ſpeak of traverſing the Place, Time, Diſcent, Seiſin or Diſſeiſin, or Conveyance, or dying ſeized, and where one muſt make a Title on his Traverſe, and where it is not neceſſary; and where a Man muſt traverſe, and where it is not neceſſary. In all which I have cited the Caſes ſomewhat largely, becauſe this ſort of Learning is Curious and Intricate.

TO traverſe is no more than to deny a thing to be true, in theſe Words, *Abſque hoc*, &c. Kitch. 140, 227.

Take two or three Rules of Traverſes in general before I come to the particular Points.

Rules of Traverſe.

1. If one will take a Traverſe to a Declaration, he ought to traverſe that part of it (or the material part) that the doing thereof will make an end of the Matter for which the Plaintiff declares, and then the Traverſe is good. *Stiles pract. Reg.* 318. as where there is a Diſſeiſin and a Diſcent alledged in a Declaration, if the traverſing the Diſſeiſin will make an end of the Matter, there the Diſſeiſin is to be traverſed, and not the Diſcent; as in ſuch Caſes where it may be ſuppoſed that the Party may come to the Eſtate by Diſſeiſin. *ibid. Stiles Rep* 344. *Wood* and *Holland*.

Treſpaſs

Treſpaſs for taking his Beaſts in *B.* The Defendant juſtifies that this is the Free-hold of *M.* and that he as his Bailiff took the Beaſts Damage-Feſant. The Plaintiff replies, *De injuria ſua propria, abſque hoc* that he is Bailiff. It's an ill Traverſe: this makes no end of the Matter, becauſe he hath confeſſed it was the Free-hold of *M.* and if the Free-hold be in a Stranger, the Plaintiff had not Colour to have Treſpaſs, be the Defendant Bailiff or not. 1 *Rolls Rep.* 46. in *Lee*'s Caſe. 33 *H.* 6. 3.

Treſpaſs for taking three Loads of Oats. The Defendant pleads he took them Damage-Feſant being on his Land, of which Land he had a Leaſe made to him by *B.* the Place called, *&c.* within ſuch a Pariſh. The Plaintiff replies and agrees the ſaid Leaſe, and ſaith, he was Parſon of the Pariſh of *T.* and he took the Oats for Tithes. The Defendant rejoins, *proteſtando* That they were not ſet forth for Tithes, *pro placito* that *S.* did not demiſe to *H.* for one Year, who (as the Plaintiff ſuppoſeth) did ſow the Land, and did ſet forth the Oats for Tithes, and traverſeth the Leaſe made by *S.* to *H.* for a Year. The Traverſe is bad, both as to the Matter and the Manner, this is an immaterial Traverſe, and goes not to the point of the Action, be the Demiſe to *H.* for one Year or half a Year, it's not material. The Defendant might have ſaid he was not Parſon, or that it was not within the Pariſh, or *abſque hoc quod poſſeſſionat. fuit* and ſowed; and a material Traverſe might have been upon any of theſe. And as to the Manner of the Traverſe it is alſo void; for he doth here only Traverſe the Conveyance to the Title which enables him to have the Tithes, which is not good. 3 *Bulſtr. p.* 336. *Mountford* and *Sidy.*

If

If the Traverſe anſwers the material Part of the Declaration is well enough. *vide* 2 *Sanders* 3. *Mellor* and *Walker*.

2. Where the Defendant hath given a particular anſwer in his Plea to all the material Matters contained in the Declaration, there he needs not to take a Traverſe; for a Traverſe is the denial of a thing, and when a thing is anſwered there needs no denial. So it is where the Defendant hath confeſſed and avoided all the Matter contained in the Declaration. *Stiles pract. Reg.* 319.

Treſpaſs for breaking his Cloſe. The Defendant ſaith, That it is his Free-hold; if the Plaintiff doth entitle himſelf by a Term for Years, he ſhall not traverſe the Free-hold of the Defendant, for that he had ſufficiently avoided it. *Cro. Car.* 384. 1 *Sanders* 23. *Vide infra.*

3. In a Plea you muſt never conclude a Traverſe, *Et de hoc ponit ſe ſuper Patriam.* If it be ſo pleaded demur ſpecially.

4. Where a thing alledged doth confeſs and avoid my Plea, I may traverſe it. 13 *Eliz. Dier. Touch. Preſ.* 199.

5. Where the matter is not traverſable without an Inducement, the Inducement it ſelf is traverſable. As in Treſpaſs, Juſtification by ſpecial Warranty, *abſque hoc* that he is guilty before or after the day of the Warrant, is traverſable. 3 *Keb.* 207. in *Dunſdale*'s Caſe.

6. If one bring an Action of Treſpaſs for breaking his Cloſe on a certain Day, if the Defendant plead a Releaſe of all Actions, he ſhall traverſe all Treſpaſſes after; if a Feofment, he ſhall traverſe all Treſpaſſes before; if a Licence for once, all before and after. Now the Plaintiff hath choice to leave the Traverſe, and to traverſe the point of Juſtification (*viz.*) the Releaſe, Feofment or Licence; or he may alledge a Treſpaſs before

before or after, and ſo join upon the Traverſe offered: this is a Traverſe after a Traverſe, but not a Traverſe upon a Traverſe to the ſelf ſame Point. *Hob. p.* 104. in *Digby's* Caſe.

7. The Traverſe muſt not be of Matter in Law. The Defendant juſtifies as Bailiff by *Fi. Fac.* who *per vias uſuales* entred the Plaintiff's Barn where the Goods were, *&c.* The Plaintiff replies, the Doors were ſhut, *abſque hoc* there was a Requeſt. It's a void Traverſe, and alſo double. And *per Cur.* it's not material in caſe of a Barn (which doth not appear to be Parcel of a Dwelling-houſe) whether the Doors be open or ſhut, and ſo the Traverſe immaterial. 1 *Keb.* 698. *Penton* and *Browne.*

8. The Traverſe muſt be a full, expreſs, and ſtrict Anſwer to the Point, and not by way of Circumſtance. Treſpaſs for taking his Cattle, *ita quod per fugationem interierunt.* The Defendant pleads the Place where is holden of him by ſuch Services, and that he diſtrained and impounded them in a Pound overt, and that they died there *de Fame* in default of the Plaintiff, *quæ eſt eadem Tran.* It's no good Plea without a Traverſe *quod per effugationem non interierunt. Cro. Eliz. p.* 384. Pleads Entry and Intruſion. Repl. ſaith, *abſque hoc quod H. O. intravit & ſic ſe intruſit.* It's ill. *Yelv. p.* 170. *Goddard's* Caſe.

9. To a common Bar the New Aſſignment is ſufficient in a Replication, and a Traverſe is idle. As Treſpaſs for taking forty Cart-loads of Hay in *K.* The Defendant pleads the Hay grew in *D.* and that the Tithes thereof belong to the Vicar, and he as Servant, *&c.* The Plaintiff replies, theſe were growing on other Lands in *K. abſque hoc* that they grew in *D.* the Lands alledged by the Defendant. The Defendant rejoins, that they grew in *D. abſque hoc* that they grew on the Plaintiff's

Plaintiff's Land. The Traverſe is void. 3 *Keb.* 728. *Darrell's* Caſe.

Traverſes are ſometimes of the { *Place*, *Time*, *Matter*, as { *Diſcent*, *Seiſin* or *Diſſeiſin*. *Manner*.

Traverſe of the Place.

As to traverſing the Place alledged, obſerve:

Where the Juſtification is Local (that is) where it is reſtrained to a certain Place, there the Traverſe of the Place is good.

To underſtand this, you muſt know Juſtifications are { *Local*, *Tranſitory*.

Local is, when the Cauſe of the Juſtification is tied and reſtrained to a certain Place, it is ſo local that it cannot be alledged in any other Town or Place; as Sale of Goods, Conuſance of Pleas, killing a Dog on a Warren, cutting and taking away of Trees, Faux Impriſonment, digging Ground, *&c.*

Tranſient or *Tranſitory* is, When the Cauſe for which the Defendant juſtifies is not reſtrained to a certain Place, but may be alledged any where; as *ſon Aſſault demeſne*, or that the Plaintiff aſſaulted him. In Action of Aſſault and Battery, the Defendant ſhall not traverſe the County: For the Reaſon of this Difference is (*viz.*) carrying away Goods, ſpoiling Writings, *&c.* are *Tranſient*.

In Treſpaſs for a Tort, the Plaintiff may alledge it to be done in any other Place, or in another County; and if the Defendant pleads not Guilty, the

the Jurors are bound to find for the Plaintiff. And ſo in Actions brought for things Tranſitory. Neither can the Aſſault, Battery, or taking of the Goods alledged in another County be traverſed without ſpecial Cauſe of Juſtification, which extendeth to ſome certain Place: As if a Conſtable of a Town in another County arreſteth the Body of a Man that breaks the Peace there, he may traverſe the County (but he muſt not reſt there) but all other Places ſaving in the Town whereof he is Conſtable. And ſo it is of taking Goods, the Defendant juſtifies for Damage-Feſant in another County, he muſt traverſe as before.

But where the Cauſe of the Action is not reſtrained to a certain Place, and ſo local as it cannot be alledged in any other Town, as in the Caſes aboveſaid, and the like; then albeit the Action be brought in a Foreign County, yet he muſt alledge his Juſtification in the County where the Action is brought. As if a Man be beaten in the County of *Middleſex*, and he brings his Action in the County of *Bucks*, the Defendant cannot plead that the Plaintiff aſſaulted him in the County of *Middleſex*, and traverſe the County of *Bucks*, but he muſt plead his Juſtification in the County of *Bucks*, for that the Cauſe of his Juſtification is good in any Place. *Co. Litt.* 282.

More Caſes applied to this Rule.

Treſpaſs for taking of Goods in a Place in *Yorkſhire*. The Defendant juſtified in a Place in *Durham, abſque hoc* that he was guilty in *Yorkſhire*. It's a good Traverſe to the Place, for it is local. *Vinch. p.* 7.

Partridge was beaten in the County of *Glouceſter* by Sir *H. P.* for which he brought an Action in *London*. Sir *H. P.* would have juſtified by Aſſault

ſault of the Plaintiff in the County of *Glouceſter*, with a Traverſe that he was not guilty in *London*. But it was then ruled by the Court, that he could not ouſt the Plaintiff to ſue in *London*: But in ſuch a Caſe he might have alledged, that the Aſſault was done in *London*, becauſe it was alſo a thing Tranſitory, of which they ſhall take notice there, and ſo help himſelf if the Matter had been true. This Caſe cited in *Popham*'s *Rep.* 101. in *Paramore* and *Verrald*'s Caſe. Now it is the common Practice in ſuch Caſe to alter the *Venue* on Affidavit: But,

Aſſault and Battery in *London*. The Defendant Pleaded the Plaintiff entred his Houſe at *W.* in *Eſſex*, and he *molliter manus impoſuit* upon him to put him out of his Houſe, *quæ eſt ead. Aſſault, Battery & Maletractatio, abſque hoc*, that he is guilty *extra W.* and it was thereupon demurred, becauſe this Treſpaſs being tranſitory the Place is not traverſable. But *per Cur.* the Cauſe of Juſtification being local (*viz.*) the maintaining the Poſſeſſion of his Houſe, he cannot juſtify in another Place, and he may traverſe every other Place. But as to *Partridge*'s Caſe, where one juſtifies by reaſon of an Aſſault in another County, and traverſeth the County in the Declaration, that is not good, becauſe the Juſtification is perſonal and tranſitory as well as the Battery. *Cro. Eliz.* 705. *Peacock*'s Caſe. *Vide Cro. Eliz. Purchaſe* and *Hutchins*.

But *Partridge*'s Caſe was, The Plaintiff ſuppoſed the Battery at *B.* in *Com. Midd.* The Defendant juſtifies by reaſon of an Aſſault at *C.* in *Com. Gloc. abſque hoc* that he beat the Plaintiff at *B.* in *Com. Midd.* The Plaintiff demurs on the Traverſe, and Judgment for him, for the County is not traverſable, the Matter of the Juſtification being meerly tranſitory: But if the Sheriff juſtify Impriſon-

Impriſonment by a *Cap.* there the Juſtification is local, and the Sheriff could not take the Plaintiff by Force of the ſaid Proceſs in another County; and there the Traverſe of the County is good. 2 *Leon. p.* 79. *Partridge* and *Poole.*

Treſpaſs *quare ſcy & import en Clanfield.* The Defendant juſtifies in *B.* and Judgment was *pro Quer.* becauſe he doth not anſwer to the Treſpaſs; for he ought to have traverſed *abſque hoc* that he was guilty in *C. Aliter* in Battery. 2 *Rolls Rep.* 495. Biſhop of *Oxon* againſt *Adams.*

Treſpaſs for taking of Goods at *London* 25 *Jan.* The Defendant pleads that he lett an Houſe in *Covent-Garden* to the Plaintiff, and for Rent arrear 23 *Jan.* he diſtrained, *abſque hoc* that he is Guilty in *London vel alibi extra St. Paul's Covent-Garden,* or at any time after 23 *Jan. Per Cur.* the Traverſe is ill, inaſmuch as he may be guilty in another Houſe in *Covent Garden. Siderf. p.* 293. Lady *Medein's* Caſe.

Treſpaſs of Battery and Faux Impriſonment ſuch a Day and Place. The Defendant Juſtifies at another Day and Place, by Virtue of a Writ and Warrant of the Sheriff upon it, *abſque hoc* that he is guilty *aliter vel alio modo, vel* at any other Place. The Plaintiff replies that he is guilty *aliter & alio modo,* and at another Place. Iſſue and Verdict *pro Quer.* But upon the Illneſs and Uncertainty of the Iſſue, Judgment was ſtayed. 2 *Levinz.* 164. *Maſters* and *Wood.*

In Treſpaſs for taking of Goods in *Yorkſhire,* and the Defendant juſtified as Servant to the Biſhop of *Durham,* who had a Fair, and preſcribed to ſeize Cattle for not paying Toll, and he juſtified in a Place in *Durham, abſque hoc* that he was guilty in *Yorkſhire.* Good. *Winch. p.* 7.

If the Juſtification be in another County, the County wherein the Action is brought ought to be

be traverſed; and the Plaintiff may maintain the Action and Iſſue if he will, or he may traverſe the Defendant's Plea at his Election. Treſpaſs of Aſſault, Battery and Wounding in *London*. The Defendant juſtifies in *Com. N.* by Virtue of a Warrant upon a *Latitat, quæ eſt ead. Tranſgreſſio, abſque hoc* that he is guilty in *London, vel alibi extra Com. Norf. Cro. Jac. Bateman* and *Woodcock.*

When the Juſtification is local the County is traverſable. *Cro. Eliz.* 375. *Sharrock's* Caſe.

Aſſault and Battery laid at *S.* in *Com. H.* The Defendant ſaith he is Servant to a Scholar of St. *John's* College in *Cambridge*, and that they are to have Conuſance there, and not be drawn out of the Univerſity. It's an ill Plea, for he ought to traverſe, *abſque hoc* that he is Guilty in any Place *extra Univerſitat' Camb. Bulſtr.* 3. 282, 283.

Treſpaſs for that *apud E. in Com.* C. he killed his Dog. The Defendant pleads that Sir *F. W.* was ſeized in Fee of a Warren in the ſame County, whereof he is and then was Warrener, and that his Dog was divers times killing Coneys there; and he finding them there *tempore quo*, &c. running at Coneys, killed him, *abſque hoc* that he was guilty *apud E. prout.* It's good, though he traverſe that Place only, and not all other Places, for his Cauſe of Juſtification is local. *Cro. Jac.* 44. *Wadhurſt* and *Damme.*

Faux Impriſonment in *Middleſex.* The Defendant pleads he was Mayor of *Lyn*, and *Cuſtos Gaolæ* there, *&c.* and ſo committed him, *&c. abſque hoc* that he is guilty of the Impriſonment in *Middleſex.* It was objected that the Traverſe is not good; for he cannot traverſe the Place but generally, for the Defendant cannot ſtreighten the Plaintiff to a Place. But *per Cur.* the Traverſe is good; for if he traverſe generally, the Juſtification

cation in a Place certain ſhall be waved, which is material as this Caſe is, and ſhall not be enforced to it where it is local; and in *Covet*'s Caſe it was adjudged in Faux Impriſonment, He juſtifies as Conſtable in *Suſſex*, *abſque hoc* that he is guilty in *Middleſex*, and awarded good. So in *Lovell*'s Caſe in Treſpaſs for taking his Horſe in *Cambr.* he juſtifies for Damage-Feſant in *Eſſex*, *abſque hoc* that he was guilty in *Cambr.* and good. *Cro. Eliz.* 168. *Smith* and *Heliar.*

In Treſpaſs *quod clauſum fregit, & arbores ſuccidit in D.* The Defendant juſtifies the Treſpaſs in *S.* without that that he is guilty of any Treſpaſs in *D.* It's made a *Quære* in *Dier* whether it ſhould not be *Non culp.* generally. *Dier* 19. *Pl.* 109.

Treſpaſs was ſuppoſed to be in *London*, and the Defendant juſtifies in a Cloſe in *S. abſque hoc* that he was guilty in *L. vel alibi extra S. præd.* 1 *Rolls Rep.* 19. *Quære* if it be a good Plea; for by this Plea he may be guilty in *S.* out of the ſaid Cloſe, which is not anſwered.

Treſpaſs for Battery and Impriſonment at *C.* in *Devon.* The Defendant pleads he was Steward of the Court of Stannaries held at *A.* in *Devon.* where, becauſe the Plaintiff would not put in pledges to a certain Action brought by *J. S. &c.* he gave Judgment and commanded the Officer to take him till he paid 28 *l. abſque hoc* that he is guilty of the Impriſonment in any Place out of the Juriſdiction of the Stannaries. Upon Demurrer, *per Cur.* the Plea is ill; for that it doth not appear by this Plea, whether C. be within the Juriſdiction of the Stannaries or not, and if it be within the Stannaries, then the Plea is not good, becauſe it is no anſwer to it. 1 *Rolls Rep.* 267. *Evely* and *Foley.* 2 *Bulſtr.* 326. *meſme Caſe.*

A Man (now) may not traverſe the County, unleſs it be on a ſpecial Juſtification in another

Place, by reason of his Office or such like. 1 *Rolls Rep.* 1. *Vide Cro. Eliz.* 860.

Trespass of Assault and Faux Imprisonment supposed to be done in such a Parish and Ward in *London*, 20 *May* 35 *Eliz.* The Defendant justifies by reason of an Execution upon a Recovery in the Court of *Sandwich* within the *Cinque Ports* in Debt, and traverses *absque hoc* that he was guilty in *London*, *&c.* The Plaintiff replies and maintains the Assault and Imprisonment, and traverseth *absque hoc quod habetur aliquod tale recordum loquele, prout* the Defendant hath alledged, *& hoc paratus est verificare per record.* The Defendant demurs. *Per Cur.* the Defendant's Plea *prima facie* was good, because it was a special manner of Justification, which cannot be pleaded and alledged to be in any other Place than where it was done: But in this Case if the special Matter alledged in the Foreign County be false, as here, the Plaintiff may maintain his Action, and traverse the special matter alledged by the Defendant; and so in such a case a Traverse may be upon a Traverse, when Falsity is used to oust the Plaintiff of that Benefit which the Law gives him. *Popham. p.* 101. *Paramour* and *Verrald. Cro. Eliz. p.* 18. *Mesne Case.*

Trespass for taking two Hats of the Plaintiff at *East-Greensted* in *Sussex* 10 *Jan.* 35 *Car.* 2. The Defendant justifies for Stallage in a Fair by Prescription, at *Gombridge* in *Kent*, held 14 *Sept.* 35 *Car.* 2. *quia* the Plaintiff refused to pay the Stallage, *quæ est ead.* &c. *absque hoc* that he is guilty of the Caption *extra Feriam præd.* The Plaintiff demurs specially; because *placita præd. non respondit narration'*. It was objected that the Traverse is not good, because he does not traverse at another Time, as well as at another Place. But *per Cur.* the Conclusion *quæ est ead.* with a Tra-

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verſe of another Place is good, without Traverſe at another time. Judgment *pro Def.* 3 *Levinz.* 227. *Bodly* and *Wilkins.*

A Traverſe muſt not be a Departure from the firſt Plea, nor repugnant to the Matter which induceth it. Treſpaſs *quare averia cepit apud* S. *& ad loca incognita fugavit.* The Defendant pleads he took them Damage-Feſant, and chaſed them to *S.* aforeſaid, and from thence to *F.* in the ſame County, *ad imparcand. quæ ſunt ead. captio & effugatio unde,* &c. *abſque hoc quod cepit averia prædicta apud* S. *prout,* &c. *Per Cur.* the Plea is ill *cauſa qua ſupra*; and as this Caſe is there needs not any traverſe at all; for here the Cauſe of Juſtification is tranſitory, and it ſufficeth here, tho' he juſtify in another Place, to ſay *quæ eſt ead. captio,* &c. *Cro. Eliz. p.* 667. Sir *Walter Sands* verſus *Lane.*

In Treſpaſs at *D.* in *Com. Kanc.* The Defendant juſtifies in defence of his Free-hold in *Canterbury, quæ eſt ead. Tranſgreſſio, abſque hoc* that the Defendant is Guilty at *D. vel alibi.* The Plaintiff demurred, becauſe the *quæ eſt ead.* is ſufficient without a Traverſe. 1 *Rolls* 327. *Courter's* Caſe. 1 *Rolls* 221. *Bateman's* Caſe. 1 *Rol's* 19. *Pl.* 20. *Auſten's* Caſe. *Sed non allocatur*; for the Traverſe implies the *quæ eſt ead.* 3 *Keb.* 799. *Moreon* and *Charton.*

If the Defendant juſtify at another Place, where his Juſtification was not local, it's ill. 1 *Sanders* 85.

Quod Def. eſt ſeiſitus de terra in L. *in qua invenit averia dam. facien. & travers quod eſt culp. in* S. *exitus quod eſt culp. in* S. Ra. Entr. 630, 665.

Juſtificatio captionis bonorum empt. in Londen. & traverſe quod eſt culp. in Com. E. Ra. Entr. 676.

Non culp. al novel Aſſignment in terris vocat. H. *& ad terras vocat.* W. *quod jacent in alia villa.* Aſh. 438.

Quod Def. ut ſerviens L. P. *qui fuit ſeiſitus de Manerio de* N. *in Com.* L. *piſcbatus fuit in Rivulo de* A. *in eod. Com. abſque hoc quod eſt culpab. de captione, ſive aſportatione aliquorum Piſcium apud* W. *in Com.* N. 2 Browne 177.

Traverſe of the Time.

A Man brings Action of Treſpaſs for breaking his Cloſe one Day; he maintains this Action by any one of an Hundred Treſpaſſes before his Action brought; which is the Reaſon that tho' the Defendant juſtify for all that Day; yet he ought to traverſe all Treſpaſſes before and after this Day until the time of the Action brought. *Hob. p.* 104. in *Digby's* Caſe. The Day in Treſpaſs is not material; therefore Treſpaſs is laid to be done the firſt of *May*; the Defendant pleads a Releaſe made to him the firſt of *June*, *abſque hoc* that he was guilty at any time after the firſt Day of *June*. *Per Cok.* he muſt traverſe that he was guilty before or after the firſt day of *June*. 3 *Bulſt.* 209. *Amſon* and *Walcott*.

In Treſpaſs 10 *November*. The Defendant juſtifieth at another Day, and doth not traverſe, as in *Digby's* Caſe, but ſaith only *quæ eſt ead. tranſgreſſio*. *Per Cur.* this is Subſtance on general Demurrer. 2 *Keb.* 878. *Smith* and *Butterfield*.

Treſpaſs of Battery and Impriſonment, 1 *May* 9 *Jac.* The Defendant juſtifies by Warrant to arreſt 4 *May*, 10 *Jac. abſque hoc* that he is guilty before. He ought to have traverſed that he was guilty before or after the Return of the Writ. 1 *Rolls Rep. p.* 406. *Amſon* and *Walcott*.

Treſpaſs

Treſpaſs for cutting ſix Poſts, *&c.* 1 *May*, 28 *Eliz.* The Defendant pleads, That on 1 *May*, 27 *Eliz.* it was the Free-hold of *A. M.* and he by his Command entred, and cut the ſaid Poſts, *que eſt ead. Tranſgr. abſque hoc*, that he was guilty of any Treſpaſs before the ſaid 27 *May*, but doth not traverſe the time after, therefore it's ill. *Cro. Eliz. p.* 87. *Higham* and *Reynolds.*

But obſerve in ſome caſes the Day may be material, as where the Party claims by ſpecial Conveyance, as 18 *H.* 6. 14. Action againſt *J. S.* for taking his Servant, and counts that he by Deed retained his Servant in ſuch a Week. The Defendant may well plead the Servant was retained with him the *Friday* after; *abſque hoc*, that the Plaintiff retained him on *Munday*. But this is not a Rule always, *vide Yelv.* 122, 123.

If the Defendant juſtify the Treſpaſs at another time, and not at the preciſe time laid in the Declaration; yet if he aver that it is the ſame Treſpaſs whereof the Plaintiff complains, the Plea is good in Subſtance. 2 *Sanders* 5. It is but Form, and aided upon a general Demurrer.

The Defendant traverſeth the Day where it was not material, for he might have juſtified the ſame Day that the Plaintiff hath declared, without any Traverſe; yet the Plea was allowed in 1 *Sanders* 13. *Haw* and *Planner*. But it was in the caſe of a great Miſdemeanour.

In Treſpaſs for the taking of Goods, the Defendant pleads a Recovery in the Court of *Dorcheſter* in Debt againſt the Plaintiff, and Execution upon it by *Fi. fac.* and juſtifies the taking, appraiſment and ſale of the Goods by the Conſent of the Plaintiff in part of Satisfaction of a Judgment; *quæ eſt ead. captio*, &c. The Plaintiff demurs upon the Plea, becauſe the Defendant varying in the Time of the taking from the Time alledged in

the Declaration, he ought to traverſe any other taking, for the ſame Goods may be taken at ſeveral times, and the *quæ eſt ead. captio* is not ſufficient. But *per Cur.* the Averment is ſufficient. Sir *T. Jones* 146. *Allen* and *Chaming.*

In ſome Caſes where the thing is local, the Defendant need not traverſe before and after generally.

In Treſpaſs and Faux Impriſonment laid 1 *Apr.* The Defendant juſtifies at another Day at *Warwick* as Sheriff, *abſque hoc* that he was guilty on 1 *Apr.* or at any time before or after while he was Sheriff, or at any other Place. *Per Cur.* this Traverſe is ſufficient, and the Plaintiff muſt reply and ſhew if there were any other Aſſault or Impriſonment; alſo the traverſing the time both before and after, doth not lock up the Plaintiff from aſſigning another Day and Place, eſpecially the thing being local. 2 *Keb.* 237. *Law* againſt *King.*

In Treſpaſs 1 *May.* The Defendant juſtifies at another Day, *quæ eſt ead. Tranſgreſſio* (of cutting Trees.) *Per Cur.* it is ill, unleſs it were tranſitory only: but there ſhould be a Traverſe *abſque hoc* that he is guilty at the Day in the Declaration; and in the Caſe of *Law* and *King* there was a Traverſe *abſque hoc*, that he was guilty while Sheriff. 2 *Keb.* 860. *Marſhall's* Caſe.

Treſpaſs for breaking into his Chamber, and taking Goods 9 *Oct.* The Defendant juſtifies by Leaſe of an Houſe by *N.* for a Year to *B.* which was aſſigned to the Defendant, who lett one Room to the Plaintiff for a Quarter, and that after the end thereof the Goods being there, they were taken Damage-Feſant, *abſque hoc* that the Goods were taken the Day alledged within the Quarter, or at any Day during that Leaſe. The Plaintiff replies, *de injuria ſua propria.* The Defendant demurs on *Crogat's* Caſe, *de ſon tort* is no Plea where

Property is in queſtion. *Per Cur.* the Traverſe is too ſhort, being tied up to the Quarter of a Year, to which the Plaintiff makes no Title, and leaves not the Plaintiff, as he ought, to traverſe the Time or the Point of Juſtification; for before the Quarter of a Year Treſpaſs lieth. So the Traverſe is ſhort, for the Plaintiff may prove any Day before the Treſpaſs brought. 2 *Keb. p.* 712, 735. *White* and *Stubs.* The Reporter ſeems confus'd in this Caſe; *capiat qui capere poteſt.*

If to a Treſpaſs *clauſo fracto* 11 *March*, the Defendant pleads a Licence 5 *Maij*, there he may and muſt traverſe *abſque hoc quod ſit culpab. ante Licentiam ſibi conceſſam*; and the Plaintiff may take Iſſue upon the Licence, or upon the Traverſe. *Kel.* 340. *Hob.* 104.

The Plaintiff ſuppoſed the Treſpaſs and Faux Impriſonment to be the tenth of *December* 29 *Eliz.* The Defendant pleads, That he by Virtue of a Warrant of the Sheriff, *&c.* did arreſt and impriſon him the ſecond and third Days of *December* before; *abſq; hoc* that he was guilty before or after the third Day of *December*, *prout in narratione ſua ſpecificatur*, (but ſaith not before the Action brought) and on this Iſſue is joined, and ruled to be well enough. *Cro. Eliz.* 95. *Richardſon* and *Pricket.*

Tranſ. de clauſo fract. 9 *Maij. Bar quod clauſum fuit liberum tenementum* 10 *Maij, & traverſe quod eſt culp. antea.* 34 H. 6. 13.

Juſtificatio per Warrant ſur Repl. & traverſe quod eſt culp. ante diem. Repl. quod eſt culp. antea. Ra. Entr. 669. Vet. Entr. 158, 163.

Bar per arbitrament, & traverſe quod eſt culp. poſtea. Repl. quod eſt culp. poſtea. Ra. Entr. 607.

Juſtificatio per Def. pro amerciament. & traverſe quod eſt culp. ante diem. Ra. Entr. 606.

Præſcriptio pro communia paſturæ in ſeperalibus terris ad ſeperalia tempora pro ſeperalibus averijs; & traverſe quod eſt culp. cum equis, &c. *ac a feſto ad feſtum. Repl. quod eſt culp. cum equis*, &c. *ac poſt feſtum, & non reſpond. ad Præſcriptionem.* Ra. Entr. 579.

Præſcriptio pro communia paſturæ per 14 *dies ante & poſt feſtum, & traverſe quod eſt culp. ante vel poſt. Exitus ſuper præſcriptione, & quod eſt culp. ante & poſt.* Ra. Entr. 618.

Vide Ra. Entr. p. 623. *Præſcriptio par* certain Times and Years, *& traverſe quod eſt culp. aliquo alio tempore ante vel poſt diem in narratione præterquam temporibus per Def. allegat. & alius ſimilibus ſequen. & præceden.*

Treſpaſs 20 *die Maij.* The Defendant pleads a ſpecial Juſtification *de Treſpaſs le* 11 *die Maij, & traverſe que eſt culpab. devant un apres.* Co. Entr. 651. 1 Browne 379.

Traverſe of Diſcent.

In Treſpaſs, the Defendant conveyed to the Donee by five or ſix Diſcents, by dying ſeized of the Eſtate Tail in every of them; the Plaintiff confeſſed the Intail, and conveyed to him by Feoffment made by the Heirs of the Donee, which was a Diſcontinuance, and took traverſe to the dying ſeized of the ſame Feoffee. It was ruled to be ill; for he ought to traverſe the moſt ancient Diſcent. *Dier* 107. cited in *Winch. p.* 13. Sir G. *Savill's* Caſe.

Where the Diſcent is not traverſable but the dying ſeized. *Cro. Eliz.* 277.

Traver

Traverſe of Seiſin, or Conveyance, and of dying ſeized, and the Diſſeiſin, and of the Free-hold.

When the Plaintiff and Defendant claim from under one Perſon, the Conveyance may be traverſed; but not if they claim under ſeveral Perſons. As,

Treſpaſs *quare vi & armis clauſum fregit.* The Defendant pleads in bar, That *J. S.* was ſeized in Fee, and made a Feoffment to *J. D.* to the Uſe of *D.* in Tail, and claims under the Tail. The Plaintiff replies, That *J. D. de temps dont*, &c. is ſeized in Fee, and made a Feoffment to him, and he continued ſeized until the Defendant did the Treſpaſs; *abſque hoc* that *J. S.* had enfeoffed *J. D.* in Fee: and adjudged ill; for he ought not to traverſe the Conveyance when they claim under ſeveral Perſons; for there the laſt Feoffment, or laſt dying ſeized is traverſable only. 2 *Rolls Rep.* 362. *Barker* and *Blackmore.* But this Caſe is more fully reported by *Cro. Jac.* 681.

In a *Clauſum fregit.* The Defendant pleads, long time before, *&c.* one *J. S.* was ſeized in Fee, and 12 *Eliz.* enfeoft *T. N.* to the Uſe of *J. B.* and *M.* his Wife, and the Heirs of their Bodies; and that they had Iſſue *H. B.* and died ſeized, which deſcended unto him, and from him to his three Daughters, and juſtifies by their Leaſe and gives Colour. The Plaintiff replies, That long time before the Treſpaſs, that Sir *T. T.* was ſeized in Fee, and gave it to *E. B.* and *J.* his Wife, and the Heirs Males of their Bodies, and that they had Iſſue the ſaid *J. B.* and the Plaintiff, and that *J.* had Iſſue *H.* and died, and *H.* died without Iſſue Male, wherefore he as Heir Male entred, *&c.* and traverſeth the Seiſin in Fee alledged in *J. S. Per Cur.* it is in his Election to traverſe the Seiſin in Fee

Fee alledged in the Bar, or the Gift in Tail. *Cro. Jac.* 681. *Vide* 6 *Rep.* 25.

Treſpaſs *de Clauſo fracto.* The Defendant pleads before the time of Treſpaſs one *Francis Taylor* was ſeized in Fee of the Tenements whereof, *&c.* and died, and it diſcended to *Francis* his Son and Heir, who demiſed to the Defendant for two Years, by virtue whereof he entred, and gives Colour to the Plaintiff by a Grant made to him by *Francis* the Father; and ſo juſtifies. The Plaintiff replies, long before *Francis* the Son had any thing, one *F. Taylor* the Grandfather ſeized in Fee before the time of the Treſpaſs, in conſideration of Marriage between *Francis* the Son and the Plaintiff *Rachael*, ſettles the Land to the Uſe of *Francis* and *Rachael* in ſpecial Tail, Remainder to the Heirs of *Francis* in Fee, *abſque hoc* that the aforeſaid *Francis* the Father of *Francis* the Son, died ſeized in Fee *modo & forma prout*, &c. Demurrer. *Per Cur.* it's a good Traverſe; becauſe that no dying ſeized is pleaded ſo that it might be traverſed, but with a *ſic ſeiſitus obiit*, and the matter only traverſable here is the Seiſin in Fee *modo & forma*; for by the Replication Seiſin jointly with the Plaintiff and to the Heirs of the Body, *&c.* with a Fee Simple in him is confeſſed, and that is good with the Traverſe. *Hutton* 123. *Edwards* and *Lawrence.*

In Treſpaſs, the Defendant pleads his Free-hold. The Plaintiff pleads the dying ſeized of his Father, and that he is Heir and entred, and that the Defendant diſſeized him. The Defendant traverſes the Diſſeiſin, and not the dying ſeized of his Father, and good. *Bro. Tra.* 30 *H.* 6. 7.

If in Aſſize I plead my Father died ſeized in Fee, and that I entred as Son and Heir to him and was ſeized until by *R.* diſſeized, who enfeoffed the Plaintiff, upon whom I entred, here the diſſeiſ-

n is not traverſable, but the dying ſeized. 30 *H.* 7. and if the Defendant plead his Father was ized and died ſeized, and gives Colour to the laintiff, the Plaintiff ought to traverſe the dying ized, and not the Poſſeſſion of the Father, which the Cauſe of the dying ſeized. 3 *H.* 6. 59.

The Defendant juſtifies in Treſpaſs, That his ather was ſeized in Fee and died ſeized, and the *cus in quo* deſcended to him as Son and Heir. he Plaintiff replies, That the Father infeoft him. djudged a good Confeſſion and Avoidance, with-ut traverſing the dying ſeized of the Father. *Dier* 266.

Where the Defendant doth alledge Seiſin in one om whom he claims, the Plaintiff cannot alledge iſin in another from whom he claims before the eiſin of, *&c.* without traverſing, confeſſing or oiding the Seiſin alledged by the Defendant. *ro. Eliz. p.* 30.

In Treſpaſs the Defendant alledged Seiſin by eſſee for three Lives, and that they as Servants nter'd. The Plaintiff replies, That before Seiſin the Leſſee for three Lives there was a Leaſe ade for 99 Years, for the Life of one *W.* under hom he claimed. The Defendant Demurs, be-uſe the later Seiſin alledged in the Leſſee for three ives is not traverſt or confeſt. *Per Cur.* it's con-ſt by ſaying, that before the Seiſin of the Leſſee r three Lives, the Plaintiff had a Leaſe for Years, nd Judgment *pro Quer.* 3 *Keb.* 467. *Parſons* and *ariſh.*

The Defendant juſtifies by Licence made the ay before the Treſpaſs by the Earl of *S.* who as ſeized. The Plaintiff demurred, becauſe he ith not the Earl was ſeized at the time of the reſpaſs, and ſo the Plaintiff can take no Traverſe. er *Cur.* The Plaintiff may traverſe the Licence, hich will bring the Free-hold and Seiſin of the Earl

Earl in queſtion, or he may take the Licence by Proteſtation, and traverſe the Seiſin of the Earl, becauſe his Seiſin ſhall be intended to continue; though the Pleading had been more formal to ſay *tempore quo*, &c. and long time before the Earl was ſeized. But this is not a Matter of Subſtance. 2 *Keb.* 266. *Thacker* and *Comberludge*.

A Traverſe muſt be ſtrict to the Point. As, The Defendant pleads in Bar, That ſuch an one was ſeized of Land in the Right of his Wife, and that his Wife died ſeized, and that he was Heir to her, and entred, and gave Colour to the Plaintiff. The Plaintiff replies, That the Husband and Wife were jointly ſeized, and that the Wife died, after whoſe Death the Husband was ſeized by Survivorſhip, *abſque hoc* that the Wife Died ſeized. The Traverſe is not good, that the Wife did not die ſeized; but it ought to be, that ſhe did not die ſole ſeized. *Winch. Rep. p.* 7.

In Treſpaſs, if the Defendant pleads *J. S.* was ſeized in Fee and enfeoft him. The Plaintiff replies, That he was ſeized in Fee, and leaſed to *J. S.* for Life, *abſque hoc* that *J. S.* was ſeized in Fee. It is good. 1 *Keb.* 374. *Holden* and *Swindale*.

The Defendants juſtifies in Treſpaſs *Quare clauſum, &c.* that the *Locus in quo* was *ſolum & liberum Tenementum* of *J.* Marquiſs of *W.* and juſtifies by his command. The Plaintiff Replies, That this Land is parcel of the Manor of *A.* and that *W.* Marquiſs of *W.* was ſeized in Fee of the ſaid Manor, and levied a Fine thereof to the uſe of himſelf, and *L.* his Wife for their Lives the Remainder to the Lord *Edward P.* for 10 years if he lived ſo long. *Willam* the Marquiſs dies and *Lucy* alſo, and that *Edward* entred, and Lett it to him for 21 years, who entred and put in his Cattle, and avers the life of *Edward*. To this Replication it was demurred, becauſe the Replication

Replication doth not anſwer nor confeſs and avoid the Freehold of the ſaid *J.* the Marquiſs alledged in in the Bar. But *per Cur.* The Bar being a Bar at large, the Title in the Replication being at large, his claiming but a Leaſe for years, is a ſufficient and good Replication, without anſwering to the Freehold, *Cro. Car.* 384. *King* and *Coke.*

In *Tranſgreſſione de clauſo fracto Def. dicit quod locus in quo eſt* 10 Acres of Land, *&c.* and Pleads it the *liberum Tenementum* of a Stranger and the Defendant as Servant, *&c.* The Plaintiff Replies, That a Stranger before the Treſpaſs was ſeized, *&c.* in Fee and Infeoft the Plaintiff, by which Feoffment he was ſeized until he was diſſeized by the ſaid Stranger, in whoſe right the Defendant juſtifies *& quod poſtea & ante tranſgreſſionem* he made a regreſs and was ſeized in Fee *quouſque* the Defendant *tali die & anno* did the Treſpaſs, the Defendant maintains the Bar and traverſeth the Diſſeizin. *Per Cur.* The Replication is naught, becauſe he doth neither deny nor traverſe the Freehold, *tempore Trangreſſionis*, but he ought to have alledged the Meſne Treſpaſs between the Diſſeiſin and the Regreſs, *&c. Dyer* 134. 179. *Book of Entries* 582.

Traverſing a Licence.

Def. juſtifies by Licence from the Plaintiff's Son. The Plaintiff Replies, *quod non intravit per Licentiam ſuam*, its a negative pregnant; for he ought to Traverſe the Licence by it ſelf, or the Entry by it ſelf, *Cro.* 2. 87. *Vide ſupra* 2 *Keb.* 266. *Thacker's* Caſe, *pag. precedenti.*

Where

Where the Command is Traverſable.

The Defendant Pleads, That the place where is the Freehold of *J. S.* and that he entred by his Command. The Plaintiff Replies, That as to one Acre it is the Freehold of *J. S.* which he let to him at Will, *abſque hoc*, that he entred by the command of *J. S.* and as to the reſidue, *&c.* By this ſpecial Pleading the Command is Traverſable. *Cro. Paſ.* 38. *Eliz. Butler* and *Wallis.*

Commandment is not Traverſable but in ſpecial Caſes, 2 *Leon.* p. 215.

Traverſe Cuſtom.

Where the Plaintiff confeſſeth a particular Cuſtom in his Replication, he ought to Traverſe the general Cuſtom alledged by the Defendant. *Litt. Rep.* 274.

Of Traverſe and Title.

Where one muſt make Title on his Traverſe, and where it is not neceſſary.

Note, This difference for clear underſtanding of this, which I ſhall largely Cite out of Juſtice *Fenner*'s Caſe, in *Popham Rept. p.* 1, 2. A Caſe acutely argued I ſay.

Note, A diverſity where in Pleading in Treſpaſs the firſt Poſſeſſion is acknowledged in the Plaintiff by the Bar, and where it appears by the Pleading to be in the Defendant, and where, and by what matter the firſt Poſſeſſion acknowledged in the Plaintiff by the Bar, is avoided by the ſame Bar; for in Treſpaſs in ſome Caſes the Plaintiff may Traverſe the Bar, or part of it, without making

making any other Title, than that which is acknowledged to the Plaintiff by the Bar; but this always ought to be where a Title is acknowleged to the Plaintiff by the Bar, and by another means deſtroyed by the ſaid Bar; for there it ſufficeth the Plaintiff to Traverſe that part of the Bar which goeth in Deſtruction of the Title of the Plaintiff compriſed in the Bar, without making any other Title; but if he will Traverſe any other part of the Bar, he cannot do it without making an eſpecial Title to himſelf in his Replication, where by the Bar the firſt Poſſeſſion appeareth to be in the Defendant, becauſe that although the Traverſe there be found for the Plaintiff; yet notwithſtanding by the Record in ſuch a Caſe, the firſt Poſſeſſion will yet appear to be in the Defendant, which ſufficeth to make his regreſs upon the Plaintiff; and therefore the Court hath no Matter before them in ſuch Caſe to adjudge for the Plaintiff, unleſs in Caſes where the Plaintiff ſhews a ſpecial Title under the Poſſeſſion of the Defendant. As in Treſpaſs for breaking his Cloſe, the Defendant pleaded that *J. G.* was ſeized in Fee and enfeoffed, *J. K.* by vertue of which he was ſeized accordingly, and being ſo ſeized infeoffed the Defendant of it, by which he was ſeized until the Plaintiff claiming by colour of a Deed of Feoffment made by the ſaid *J. G.* long before that he enfeoffed, *J. K* (where nothing paſſed by the ſaid Feoffment) entred, upon which the Defendant did Re-enter; here the Plaintiff may well Traverſe the Feoffment ſuppoſed to be made by the ſaid *J. G.* to *J. K.* without making Title, becauſe that this Feoffment only deſtroys the Eſtate at Will made by the ſaid *J. G.* to the Plaintiff which being deſtroyed, he cannot enter upon the Defendant, albeit the Defendant cometh to the Land by Diſſeiſin, and not by the Feoffment

offment of the ſaid *J. K.* for the firſt Poſſeſſion of the Defendant is a good Title in Treſpaſs againſt the Plaintiff, if he cannot maintain or ſhew a Title Paramount. But the Feoffment of the ſaid *J. G.* being traverſed, and found for the Plaintiff, he hath by the acknowledgment of the Defendant himſelf a good Title againſt him, by reaſon of the firſt Eſtate at Will, acknowledged by the Defendant to be to the Plaintiff, and now not defeated; but in the ſame Caſe he cannot Traverſe the Feoffment ſuppoſed to be made by the ſaid *J. K.* to the Defendant, without an eſpecial title made to himſelf; for albeit *J. K.* did not Enfeoff the Defendant, but that the Defendant diſſeized him, or that he cometh to the Land by another means; yet he hath a good Title againſt the Plaintiff by his firſt Poſſeſſion, not deſtroyed by any Title Paramount, by any Matter which appeareth by the Record, upon which the Court is Judge.

Where it is neceſſary to ſay Que eſt eadem Tranſgreſſio, *and where not: And of the Force and Effect of theſe Words.*

If the Defendant in Treſpaſs juſtifie the ſame day and place, it is not neceſſary to ſay, *que eſt eadem, &c.* 1 *Bulſtr.* 138. *Kelv.* 27. 29. 21 *H.* 7. 39.

Treſpaſs for breaking of his Cloſe, *&c.* laid to be done the ſeventh day of *May*. The Defendant juſtifies the Treſpaſs to be done the twentieth day of *May*; if he concludes (*quæ eſt eadem Tranſgreſſio*) the Juſtification is good; and ſo is the difference in 21 *H.* 7. 39. 1 *Bulſtr. p.* 138. *Vaſſenop* againſt *Tayler*.

In

In Treſpaſs at *D.* in *Com. Kanc.* the Defendant juſtifies in Defence of his Free-hold in *Canterbury*, *quæ eſt ead. tranſgreſſio*, *abſque hoc* that the Defendant is guilty at *D. vel alibi.* The Plaintiff demurrs, becauſe the *quæ eſt ead.* is ſufficient without a Traverſe, as 1 *Rolls* 327. *Curtis's* Caſe. 1 *Rolls* 221. *Bateman's* Caſe. 1 *Rolls* 19. *Pl.* 26. *Auſtin's* Caſe. *Sed* in this Caſe *non allocatur*; for the Traverſe implies the *quæ eſt ead. Quære.* 3 *Keb.* 799. *Moreon* and *Charton.*

In Treſpaſs 10 *No.* The Defendant juſtifies at another day, and doth not traverſe, as in *Digby's* Caſe, *Hob.* but ſaith only *quæ eſt ead. tranſgreſſio. Per Cur.* this is Subſtance on general Demurrer. 2 *Keb.* 878. *Smith* and *Butterfield.*

Where the Matter of Juſtification is local, there he ought to ſhew the Cauſe ſpecially; but not where it is tranſitory; but it ſufficeth though he juſtify in another Place, to ſay *quæ eſt ead. captio.* *Cro. Eliz.* 667. Sir *W. Sands* verſus *Lane.*

Where the Juſtification is local, as maintaining the Poſſeſſion of his Houſe, the Concluſion *quæ eſt ead. tranſgreſſio* is good enough; for it concludes it is the ſame Cauſe of Action, but with a Traverſe, as it ought to be of neceſſity. *Cro. Eliz.* 704. *Peacock's* Caſe.

Vide 2 *Sanders* 3. *Mellor* and *Walker*, where the averring *quæ eſt ead. tranſgreſſio* ſhall help the Plea.

Treſpaſs for breaking his Cloſe was laid to be done the ſeventh day of *May*, if it be concluded with *quæ eſt ead. tranſgreſſio*, it's clearly good by three Juſtices againſt *Yelverton*, by the Book of 21 *H.* 7. *fo.* 39. a. where this difference is agreed.

CAP. XXI.

Joynder in Treſpaſs.

Joynt-Treſpaſſers.

TReſpaſs in Law is ſeveral, and one may anſwer without the other. It is Joint or Several at the Will of him to whom the Wrong is done. *Co. Litt.* 130. b. f. 232. a.

Diverſe Perſons may have an Action of Treſpaſs jointly for Goods taken, *&c.* not for Battery, unleſs it be in the Caſe of a Man and his Wife. *Vide ſupra.*

By Tenants in Common, *vide ſupra.*

Treſpaſs of Aſſault and Battery made on two Perſons at one time, they ſhall not join in one Action. *Keil. M.* 20. *H.* 7. Caſe 2.

If two hold Land jointly, and Treſpaſs is done upon this Land, one cannot ſue for this without the other; but the Action ſhall ſurvive.

Joint-Tenants and Tenants in Common muſt join in all Treſpaſſes but Battery.

Acts of one Party, or to one Party, how it ſhall avail his Companion or not.

A Releaſe made to one Treſpaſſer is available to his Companion, and he may plead it. *Vide Br. per Releaſe, Co. Litt.* 232. a.

C. brought Treſpaſs againſt *D.* for breaking his Houſe and beating him, *&c.* The Defendant pleads, That he together with *R. M.* in the time of the Treſpaſs ſuppoſed, did jointly break the Plaintiff's Houſe and beat him, and that after

ward

wards, &c. the Plaintiff did releaſe unto the ſaid *M.* by his Writing, which the Defendant ſhews in Court, all Actions, Real and Perſonal, &c. and avers that the Treſpaſs whereof the Plaintiff complains, and which he and *M.* did jointly *eſt una & eadem, & non alia, neque diverſa.* It's a good Plea; for though a Treſpaſs be joint and ſeveral to this Purpoſe, that he may ſue either one or all; yet when two join in a Treſpaſs, they ſo make one Treſpaſſer, as either of them is as well anſwerable for his Fellow's Fact as for himſelf; and therefore a Releaſe to one diſchargeth the whole Treſpaſs. *Hob. p.* 66. *Cock* and *Jenner.*

Treſpaſs againſt two. It's a good Bar, that the Plaintiff had Judgment and Execution againſt one, as well for the breaking of the Cloſe as the Entry. *Leon.* 19. *Lendall* and *Pinfold. Cro. Eliz. p.* 30. *Moreton*'s Caſe.

If a Man bring Action of Treſpaſs againſt *A. quod ipſe ſimul cum B. & C.* did the Treſpaſs, and doth not ſue them all, his Writ ſhall abate; but if he bring his Action againſt *A.* and *A.* pleads the Treſpaſs done by him and *B.* and that the Plaintiff releaſed to *B.* and the Plaintiff traverſe the Releaſe; yet this Action ſhall not abate. *Hob.* 164, 199.

CAP. XXII.

Several Pleas, and the Conſequence.

TReſpaſs againſt two for taking of a Gun and Dagger from him. One juſtifies becauſe the Plaintiff aſſaulted *J. S.* with them, and in Preſervation of the Peace, and for Safeguard of the Life of *J. S.* he took them from the Plaintiff, and ſo juſtifies. The other pleads not Guilty. The Plaintiff replied againſt him who juſtified *de ſon tort demeſne*, and this Iſſue was found *pro Def.* and the ſame Jury found the other Guilty, and aſſeſſed Damages and Coſts. It was moved in arreſt of Judgment, That in regard the Action was brought againſt both the Defendants jointly, and the Juſtification is found for one, the other cannot be guilty. *Sed non allocatur*: For he is found guilty, and cannot take Advantage of the Juſtification; for it ſhall be intended he took it at another time without Cauſe. But if the one Defendant juſtifies by the Gift of the Goods, and found for him, although the other Defendant be found guilty, yet no Judgment ſhall be againſt him; for the other's Plea deſtroys the Plaintiff's Title, and ſhews that he could have no Cauſe of Action, and ſo it appears to the Court. *Cro. Jac. p.* 134. *Marlet* againſt *Ayliff* and *Eylett. Hob. p.* 54 *Alister* if the Plaintiff had ſevered the Actions. *Q.*

If Joint-Treſpaſſers be ſued in one Action, though they may ſever in Pleas and Iſſues, yet one Jury ſhall aſſeſs Damages for all; for againſt Joint-Treſpaſſers there can be but one Satisfaction; and if they be ſued in ſeveral Actions, though the Plaintiff make choice of the beſt Damage, yet

yet when he hath taken one Satisfaction, he can take no more; and if he require two, an *Audita Querela* well lies. *Hob. p.* 66. *Cock* and *Jenner*. 3 *Leon.* 122.

Where a Man hath a perſonal Action againſt two Defendants, if they plead ſeverally and he be non-ſuited againſt the one before he hath Judgment againſt the other, he ſhall be barred againſt both. For it works in the Nature of a Releaſe of the whole. But where there is but one Defendant, and he pleads to one Part in Iſſue, and to the other demurs, the Plaintiff may be non-ſuit for one Point, and proceed for another. *Hob. p.* 180. *Slowley* and *Eveleigh*.

Parker brought Action of Treſpaſs againſt *L.N.* and *W.* *L.* pleads *Non Culp.* and Iſſue. *N.* and *W.* juſtify; whereto the Plaintiff replied, and thereupon a Demurrer joined; hanging the Demurrer the Iſſue was tried againſt *L.* and Damages given and Judgment againſt him; and after Judgment the Plaintiff entred a *Nolle proſequi* againſt *N.* and *W.* *Per Cur.* if the *Nolle proſequi* had been before Judgment, it had diſcharged the whole Action; and ſo had it if Judgment had been againſt them all, and then the Plaintiff had entred the *Nolle proſequi* againſt the two, as before; for Nonſuit, or Releaſe, or other Diſcharge of one diſchargeth the reſt. But becauſe the Action was at an end againſt *L.* and no Judgment had againſt the other two, ſo as they are divided from *L.* and are not ſubject to the Damage found againſt him. *Per Cur.* he was not diſcharged. *Hob. p.* 70. *Parker* verſus Sir *John Lawrence*, *Nevill* and *Wood*.

If in perſonal Actions, as in Treſpaſs, one of the Defendants pleads a Plea which goes to the whole, as a Releaſe (which extends to both) the other pleads a Plea in Bar, which extends only to himſelf, as *Non culp.* the Plea which goeth to the

whole ſhall be firſt tried. *Co. Litt.* 125. b. Or if one pleads in excuſe of himſelf, and the other a Plea which goes to the whole, that which goeth to the whole ſhall be firſt tried; for if that be found it maketh an end of all, and the other Defendant ſhall take Advantage thereof; becauſe the Diſcharge of one is the Diſcharge of both. *Co. Litt.* 125. b.

Bar ad ſeperales terras per ſeperales titulos. Co. Entr. 660. 1 Co. 107.

Non Culp. per un, Jointenancy per auter. Ra. Entr. 615.

Tranſ. verſus A. B. C. & D. qui ſeperatim placitant non culp. ad partem poſt novam aſſignationem, & ad alias ſeperales partes ſeperatim placitant ſpecialiter. Quer. replicat. ſeperatim ad barras A. B. & C. & facit 2 Replic. ad placitum D. A. rejungit ad Replicat. B. facit 3 Rejunctiones, C. 4 Rejunctiones, & D. 4 Rejunctiones ad Replicationes. Quer. ſurrejungit ad placitum A. & facit 3 Surrejunctiones ad placitum B. & ad placitum C. &c. A very pretty Record. *Co. Entr.* 180.

Quoad partem non culp. quoad aliam partem ſon aſſault demeſne. Tompl. 335.

Repl. al part que maintain le narr. & traverſe la licence, & quoad al. part de injuria ſua propria abſque tali cauſa. Tompl. 350.

Narr. de clauſo fract. & averijs impartat. Def. placitat quoad partem in uno clauſo præſcription pur un way, & quoad al. part in alio clauſo liberum tenementum & diſtreſs pur damage feſant. Tomp. p. 360.

CA

CAP. XXIII.

Of the Replication, de Injuria ſua propria, *the Nature of it, and where neceſſary, and where good with a Traverſe.*

THIS Plea by way of Replication, is to be pleaded where the Defendant's Plea is Matter of Excuſe, and not where he claims an Intereſt; as *ſon Aſſault demeſne* in Battery, and in Scandal, levying of Hue and Cry. *Cok.* 8 *Rep.* 67. *Crogat's* Caſe.

They are Words of Art uſed in an Action of Treſpaſs by way of Replication to the Defendant's Plea. As *A.* ſues *B.* for a Treſpaſs. *B.* pleads that he did it by Command of his Maſter. *A.* replies, he did it *de Injuria ſua propria, abſque tali cauſa,* &c. or (*abſque hoc* that his Maſter commanded him *modo & forma*) and here he traverſeth the Cauſe or Commandment of his Maſter.

Where a Free hold Eſtate for Years, or Matter of Record comes in Queſtion, in ſuch caſe he ought to avoid the Title, Leaſe for Years and Matter of Record, by Matter of as high a Nature. *Latch.* 221, 273. As a Bailiff juſtifies Impriſonment, for that a *Capias* was awarded to the Sheriff, who made a Warrant to him: Here *de Injuria ſua propria* is no Plea. It's all one Cauſe, and it referreth to all the Plea in Bar, and ſo the Iſſue would be full of Multiplicity, and Matter of Record ought not to be put to the Trial of the *Laygents:* but in ſuch Caſe he may reply *de Injuria ſua propria,* and traverſe the Warrant. It might have been a good Plea in a Court not of Record. 8 *Rep.* 67. *Crogate's* Caſe.

In Treſpaſs, if the Defendant juſtify and draw a Free-hold in queſtion, ſuch Replication is not good.

Abſque tali cauſa was omitted, and the Replication not good. 1 *Rolls Rep. p.* 47.

When the Defendant in his own Right, or as Servant to another, claims any Intereſt in the Land, or to any Common, or to Rent iſſuing out of Land, or to any Way or Paſſage upon the Land, here *de Injuria ſua propria* generally is not any Plea. 2 *Sanders* 295. But where one claims not any Intereſt, but juſtifies by Command or Authority derived from another, *aliter*, with a Traverſe *ut ſupra.* 8 *Rep.* 67. *Crogate's* Caſe. *Cro. Eliz.* 359. In Trover of Trees, the Defendant pleads, Queen *M.* was ſeized in Fee of the Manor of *D.* where thoſe Trees were growing, and granted it to the Defendant in Tail, and that *J. S.* cut the ſaid Trees, and granted them to the Plaintiff who loſt them, and the Defendant found and converted. The Plaintiff replies *de Injuria ſua propria* it's not good. For the Defendant juſtifies by claiming an Intereſt in the Free-hold to himſelf. A Repleader was awarded.

Where by the Plea of the Defendant, any Power or Authority is mediately or immediately derived from the Plaintiff himſelf, or is given by the Law, as to view Waſte, *&c.* there, although no Intereſt be claimed, the Plaintiff ought to reply to this, and ſhall not reply generally *de Injuria ſua propria.* 8 *Rep.* 67. *Crogate's* Caſe.

To Aſſault and Battery the Defendant pleads, That he was poſſeſt of an Houſe in ſuch a Pariſh for Years, and that the Plaintiff entred his Houſe and would have thruſt him out of Poſſeſſion thereof, whereupon he *moliter manus impoſuit* to put him out, and the harm, if any were done, was in Defence of his own Poſſeſſion. Repl. *de Injuria*

ſua propria is good. For the Title or Intereſt comes not in queſtion. *Cro. Car. Shevill* and *Avery.*

The Defendant juſtifies, for that the Plaintiff is his Servant and neglected his Service, and he *moderate caſtigavit.* The Plaintiff pleads, *quod non moderate caſtigavit.* It's ill upon Demurrer; but good after a Verdict, by the new Statute. It ſhould have been *de Injuria ſua propria. Sid. p.* 447. *Aubrey* and *James.*

In Aſſault and Battery the Defendant pleads a ſpecial Plea and juſtifies. The Plaintiff replies, *de Injuria ſua propria.* Verdict *pro Quer.* The Replication is not good, becauſe it anſwers not the ſpecial Matter pleaded, nor takes any Traverſe by *in abſque tali cauſa,* as it ought to do, and ſo here is no Iſſue joined, and conſequently can be no Judgment. *Stiles Rep.* 150. *Jennings* and *Lee.*

Treſpaſs of Aſſault, Battery and Wounding againſt *Lee* and his Wife, for Aſſault and Battery made by the Wife. The Feme pleads a ſpecial juſtification, that it was in defence of her Huſband, and ſo juſtified the Aſſault and Battery, and *non culp.* to the Wounding. The Plaintiff replies, *de Injuria ſua propria.* The Jury find entire Damages for all, whereas there is not a perfect Iſſue joined as to the Aſſault and Battery for want of a Traverſe. The Replication was not good, and ſo the Verdict not good. It was an immaterial Iſſue, and a Repleader. *Stiles Rep.* 198, 210.

In Battery, the Defendanr juſtifies by Proceſs to arreſt one *W.* and the Plaintiff would have reſcued him, whereupon he did *molliter manus imponere.* The Plaintiff replies, *de Injuria ſua propria, abſque hoc* that the Defendant had *Virtute* of ſuch a Warrant taken as that by which the Defendant juſtified. *Per Cur.* The Juſtification is ſufficient, and better by the Admittance in the Replica-

Replication, than if the Issue had been offered *de Injuria sua propria* generally, without such Traverse. 2 *Keb.* 293. *Haywood* against *Wood.*

In Assault, *&c.* the Defendant pleads, what he did was in his own Defence. The Plaintiff replies, on Attachment out of Chancery, and by a special Warrant from the Sheriff, he arrested him, and the Defendant rescued himself, and beat the Plaintiff, *de Injuria sua propria, & hoc parat. est verificare. Per Cur.* the Conclusion is ill: he ought to plead *& hoc petit*, &c. *Cro. Car.* 164. *Duncomb* and *Smith.*

CAP.

CAP. XXIV.

In what Caſes the Defendant in Pleading, and the Plaintiff in his Replication, ought to ſhew or make his Title in certain, and in what not.

THE Plaintiff need not make any Title in an Action of Treſpaſs, it being a Poſſeſſory Action. Treſpaſs *quare Fenum ſuum cepit*; he need not convey himſelf a Title to it, as for Tithes, *&c.* and if he do it's Surpluſage. If he do make a Title, and not purſue it, it's not material. 2 *Bulſtr.* 288. *Williamore* verſus *Bamford.* 2 *Cro. p.* 123. *Dent* and *Oliver.*

Poſſeſſion to the Defendant is a ſufficient Title to put in his Beaſts, be it by Right or Wrong. *Yelv. p.* 75.

The Defendant juſtifies by Virtue of a Leaſe and ſaith generally, That at the time of the Treſpaſs he was poſſeſſed of a Cloſe called *W.* for a certain Term of Years *adtunc & adhuc ventur.* and ſhews not of what Leaſe, nor for what Time. *Per Cur.* he need not, for the Intereſt of the Cloſe is not in Queſtion, but is meerly collateral to the thing in Queſtion (which was default of Incloſures) and it is but Conveyance to the Matter ſubſequent; for whether the Defendant be ſeiſized by Title or by Tort, the Poſſeſſion and Occupation of the Land is ſufficient to juſtify the putting in his Beaſts into the Cloſe whereof he was poſſeſt, although it were but at at Will. *Yelv. p.* 75. *Faldo* and *Ridge.*

In Treſpaſs the Defendant pleads default of Incloſures, and that the Plaintiff *debuit reparare*, and doth

doth not ſhew by what Title, or in what ſort: But the Diverſity is, where the Right of Incloſing to charge the Inheritance is in Queſtion, and where the Plea goes only in excuſe of a Treſpaſs; as in *Curia claudenda*, he ought to ſhew the Title in the *debet & ſolet*; for this is only in the Right, and ſhall bind the Inheritance for ever: But in Treſpaſs it goes only in Excuſe. And alſo the Defendant is a Stranger to the Title of the Plaintiff, and may not by Preſumption know by what Title he ought to repair; and (by *Popham*) it is good Policy for the Defendant in this Caſe to be ſparing in ſetting down the Title of the Plaintiff, leſt he miſtake it, and ſo be tricked. *Yelv. p.* 75. *Faldo* and *Ridge*.

To the Aſſault and Battery the Defendant pleads, That he was poſſeſt of ſuch an Houſe in ſuch a Pariſh for Years, and that the Plaintiff entred his Houſe and would have thruſt him out of Poſſeſſion, whereupon he *molliter manus impoſuit*, &c. and good, though he doth not ſhew who made the Leaſe, nor when it was made, nor for how many Years: For it is but Inducement and Conveyance to his Juſtification, and not the Subſtance thereof, which is, that he offered to thruſt him out of Poſſeſſion; and whatſoever Title he hath it is not material, whether by Virtue of a Leaſe at will, or any other Title: For the Title or Intereſt not coming in Queſtion, it need not be ſo certain as where it is pleaded by way of Title to make a Claim in the Defendant. *Cro. Car.* 138. *Skevill* and *Avery*.

In Treſpaſs, Colour of Poſſeſſion given by the Defendant to the Plaintiff ſufficeth; becauſe the Declaration is general upon a ſuppoſal, without any Title ſet forth in certain; but in Trover and all other Actions where the Plaintiff makes a Title to the thing in demand, there the Defendant

ought

ought to make a better Title to himſelf, and to traverſe the Title of the Plaintiff, or to confeſs and avoid it. *Yelv. p.* 174. *Prieſtly* verſus *White*.

If a Servant juſtify by a Leaſe, he ought to ſhew it as well as his Maſter. As Treſpaſs for entring into his Cloſe. The Defendant pleads, That *R. L.* was Parſon of *K.* within which Pariſh this Cloſe lies, and that he by Writing under his Hand and Seal, dated, *&c.* Lett the Tithes of the ſaid Cloſe to Sir *R. O.* for three Years, whereon he as his Servant entred the ſaid Cloſe to ſee what Tithes were due, *&c.* Ill Plea, becauſe he juſtifies by Virtue of a Leaſe for Years of Tithes, and ſhews not the Deed of the Leaſe: and although he juſtify but as a Servant, yet coming in by Title and in Privity, he ought to ſhew it as well as his Maſter; and he cannot plead the Entry into another Man's Soil, without making good Title thereunto, which ought to be by ſhewing the Leaſe. *Cro. Jac.* 660. Sir *H. Rolls* verſus *Boulting*.

Treſpaſs for breaking his Cloſe, *&c.* and for Title ſhews, that this was Copy-hold, Parcel, *&c.* of which *C.* was Lord, and the Lord granted this to the Plaintiff and his Heirs. The Defendant pleads that long time before, one *Pole* and *Margaret* his Wife were Lord of the Manor in Right of the Wife for Life, remainder to *S.* in Tail, who made a Leaſe to the Defendant. It's an ill Plea; for he ought to have ſhewed how this Eſtate came to *Pole* and his Wife, and the Commencement of it. 3 *Bulſtr. p.* 282. *Sandford's* Caſe.

Treſpaſs againſt *D.* for breaking his Cloſe, and taking away two Loads of Timber. The Defendant makes Title to the Cloſe, *&c.* and that he took the Timber. Demurrer; for he hath made no anſwer to the two Loads of Timber; for the Declaration ſaith not the Timber was growing upon the Land, nor had the Defendant juſtified the

the taking this as Damage-Feſant. *Per Coke*, the making of Title to the Land is ſufficient where the Declaration is for Corn or Timber annexed to the Land: But this Plea is no Anſwer to the Timber, unleſs it appeared that the Timber was growing upon the Land; and ſo all is diſcontinued, as in *Harlakenden*'s Caſe. *Quære* if he ought to have demurred ſpecially for this Cauſe. 1 *Rolls Rep.* 406. *Denſe* and *Denſe*.

The Defendant pleads, That one *W.* was ſeized of the ſaid Meſſuage wherein the Treſpaſs was ſuppoſed to be done, and being ſo ſeized (ſuch a Day and Year) did demiſe it to the Defendant for two Years from ſuch a Feaſt then laſt paſt, by Virtue of which he entred and was poſſeſt untill the Plaintiff claiming by Colour of a Deed made of the ſaid *W.* where nothing paſſed by the Deed, upon which the Defendant entred, *&c.* The Plaintiff replies by Proteſtation, That the ſaid *W.* was not ſeized as the Defendant hath alledged, *pro placito*, he ſaith that the ſaid *W.* did not lett it to the Defendant, as the Defendant hath alledged; upon which Iſſue it was found for the Plaintiff. It was moved in arreſt of Judgment, becauſe the Plaintiff hath not made any Title by his Replication. *Per Cur.* he need not make Title in this Caſe; but it ſufficeth to traverſe the Bar without making a Title; for here it is acknowledged by the Defendant, that *W.* did demiſe it to the Plaintiff, and that this is a Leaſe at Will, at the leaſt not defeated by his own ſhewing, but by the Leaſe made to the Defendant; this being traverſed and found againſt the Defendant, the Plaintiff by the Acknowledgment of the Defendant himſelf, hath a good Title againſt him to enter into the Land, and the Defendant by his Re-entry is become a Treſpaſſer to the Plaintiff as in 2 *Ed.* 4. The Defendant in Treſpaſs pleads, That he lett the Land to the Plaintiff for another

Man's

Man's Life, and that *ceſtuy que vie* was dead, upon which he entred; and adjudged that it ſufficeth for the Plaintiff to maintain that *ceſtuy que vie* was yet living, without making any other Title. *Pop. Rep.* 1. Juſtice *Fenner* againſt *Fiſher*. The Leaſe made by *W.* to the Defendant, is the material Point of the Bar, which deſtroyed the Title Paramount acknowledged to the Plaintiff by the Colour, which is good without another Title made.

In Treſpaſs in ſome Caſes the Plaintiff may traverſe the Bar, or part of it, without making any other Title than that which is acknowledged to the Plaintiff by the Bar; but this always ought to be where a Title is acknowledged to the Plaintiff by the Bar, and by another means deſtroyed by the ſaid Bar; for there it ſufficeth the Plaintiff to traverſe that part of the Bar which goeth to the Deſtruction of the Title of the Plaintiff compriſed in the Bar, without making any other Title; but if he will traverſe any other part of the Bar, he cannot do it without making an eſpecial Title to himſelf in his Replication, where by the Bar the firſt Poſſeſſion appeareth to be in the Defendant, becauſe that although the Traverſe there be found for the Plaintiff; yet notwithſtanding by the Record in ſuch a caſe, the firſt Poſſeſſion will yet appear to be in the Defendant, which ſufficeth to maintain his Regreſs upon the Plaintiff; and therefore the Court hath no Matter before them in ſuch Caſe to adjudge for the Plaintiff, unleſs in Caſes where the Plaintiff ſhews a ſpecial Title under the Poſſeſſion of the Defendant. As, In Treſpaſs for breaking his Cloſe, the Defendant pleads that *J. G.* was ſeized of it in his Demeſne as of Fee, and enfeoffed *J. K.* by Virtue of which he was ſeized accordingly, and ſo being ſeized enfeoffed the Defendant of it, by which he was ſeized until the Plaintiff claiming by Colour of a Deed of

Feoffment

Feoffment made by the ſaid *J. G.* long before that he enfeoffed *J. K.* (where nothing paſſed by the ſaid Feoffment) entred, upon which the Defendant did re-enter. Here the Plaintiff may well traverſe the Feoffment ſuppoſed to be made by the ſaid *J. G.* to *J. K.* without making Title, becauſe that this Feoffment only deſtroys the Eſtate at Will made by the ſaid *J. G.* to the Plaintiff, which being deſtroyed, he cannot enter upon the Defendant, albeit the Defendant cometh to the Land by Diſſeiſin, and not by the Feoffment of the ſaid *J. K.* for the firſt Poſſeſſion of the Defendant is a good Title in Treſpaſs againſt the Plaintiff, if he cannot maintain or ſhew a Title Paramount. But the Feoffment of the ſaid *J. G.* being traverſed and found for the Plaintiff, he hath by the Acknowledgment of the Defendant himſelf, a good Title againſt him, by reaſon of the firſt Eſtate at Will acknowledged by the Defendant to be to the Plaintiff, and now not defeated. But in the ſame Caſe he cannot traverſe the Feoffment ſuppoſed to be made by the ſaid *J. K.* to the Defendant, without an eſpecial Title made to himſelf; For albeit *J. K.* did not enfeof the Defendant, but that the Defendant diſſeiſed him, or that he cometh to the Land by another means; yet he hath a good Title againſt the Plaintiff by his firſt Poſſeſſion, not deſtroyed by any Title Paramount, by any matter which appeareth by the Record, upon which the Court is to judge. So note a Diverſity where in pleading in Treſpaſs the firſt Poſſeſſion is acknowledged in the Plaintiff by the Bar, and where it appeareth by the Pleading to be in the Defendant and where and by what Matter the firſt Poſſeſſion acknowledged in the Plaintiff by the Bar, is avoided by the ſame Bar. *Pop. Rep. p.* 1, 2. Juſtice *Fenner's* Caſe.

Treſpaſs

Treſpaſs for entring his Cloſe and ſpoiling his Graſs with Cattle. The Defendant pleads, *quod bene & verum eſt* that the Free-hold was in Sir *J. T.* and he is Servant, and by his Commandment entred and put in his Beaſts, *&c.* The Plaintiff replies, *quod bene & verum eſt* that the Free-hold was in Sir *J. T.* but ſaith, That long time before the time in which, *&c.* Sir *J. T.* lett the Cloſe to the Plaintiff at Will, by which he entred and was poſſeſt untill the Defendant made the Treſpaſs; *abſque hoc* that the Defendant by the Commandment of Sir *J. T.* entred, *&c.* On Demurrer, adjudged *pro Def.* for the Bar is good, and not avoided by the Replication; for in his Replication (being by way of Title) he doth not entitle himſelf to any good Leaſe at Will; for he doth not alledge in Fact any Seiſin in Sir *J. T.* or any Poſſeſſion in him, out of which the Leaſe at Will may be derived. *Yelv. p.* 147. *Witham* and *Barker.*

Treſpaſs of Battery ſuch a Day. The Defendant pleads, That he *tempore quo*, &c. was ſeized of ſuch a Rectory in the Place where the Battery is ſuppoſed, in Fee, and that *tempore quo*, there were Corn ſevered from the nine Parts at the Place aforeſaid, and the Defendant came to take the Corn, and the Defendant, in Defence of his Goods, *&c.* good to defend it, and the ill which the Plaintiff did was *de ſon tort*, &c. Plaintiff replies, *de Injuria ſua propria abſque tali cauſa.* The Defendant demurrs, and adjudged *pro Quer.* For ſuch general Replication is good, and the Plaintiff need not to anſwer the Title of the Defendant; becauſe the Plaintiff by his Action claims nothing in the Soil or Corn, but only Damages for the Battery, which is meerly collateral to the Title. But where the Plaintiff makes Title by his Declaration to a thing, and the Defendant will plead another thing in deſtruction of this, or of the Cauſe of the Plaintiff's

Action, there he ought to reply ſpecially, and ſhall not ſay *abſque tali cauſa*, as 14 *H.* 4. 32. Treſpaſs for taking away his Servant. The Defendant ſhews, That the Father of him whom the Plaintiff ſuppoſed to be his Servant, held of him in Chivalry and died ſeized, his Heir (*i. e.* the ſuppoſed Servant) being within Age, and he ſeized him as his Ward, *prout ei bene licuit.* The Plaintiff replies *de injuria ſua propria, abſque tali cauſa.* The Replication was held not good without anſwering to the Seigniory (*viz.*) *de injuria ſua propria abſque hoc* that the Father of him the ſuppoſed Servant, held of him in Chivalry; and the reaſon was, becauſe the Plaintiff by his Action makes Title to the Servant. 16 *Ed.* 4. 4. *Telv.* 157. 8. *Taylor* and *Markham. Cro. Jac.* 224. *meſme Caſe.*

The Defendant juſtifies as Servant to K. *Charles* the Second, to whom the Lands deſcended from *H.* 8. The Plaintiff replies and confeſſeth themſelves *H.* 8. but ſaith that *H.* 8. granted to the Plaintiff's Anceſtor, but doth not traverſe *abſque hoc* that K. *Charles* II. died ſeized, which, *per Cur.* he ought to do; for he hath not anſwered the whole Title of the King. The Defendant rejoins, That *T.* the Anceſtor granted to *J. S.* and ſo conveys under him to the Defendant. *Per Cur.* This is a clear Departure; yet the Plaintiff could not have Judgment. 1 *Keb.* 920. *Thacker* and *Ullock.*

In Treſpaſs the Defendant juſtifies by Conveyance under the Truſtees of the Plaintiff made to his Father *modo Def.* from whom it diſcended to him, and doth not ſay as Son and Heir. *Per Cur.* It's amendable; but generally it's ill without ſhewing how, and this is Subſtance and part of the Title, and naught on general Demurrer. 2 *Keb.* 110. Duke of *Newcaſtle* againſt *Wright.*

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The Defendant pleads Not Guilty to all but hrowing down the Fences, and as to thoſe he ſaith, That he was poſſeſt of certain Corn growing here, not ſaying by what Title, and being inclo-ed the Defendant broke down the Fences, and ntred to come to it. The Plaintiff demurs ſpe-ially, becauſe the Corn growing differs not from he Land; for if *A.* ſow the Land of *B.* it's the Corn and Cloſe of *A.* till *B.* re-enter. And, *per ur.* Title muſt be ſhewed. 3 *Keb.* 61. *Peale* and *ridges*: For it might be the Leſſee's Corn grow-g there, or the Party may have the Corn by the rant of the Executors of a Leſſee. *Vide* this Caſe ported by 2 *Sanders* 401.

In Action for ſtopping a Way or Water-Courſe d of Lights, the Plaintiff need not make Title; e Cauſe hereof being the Damages only, and the itle is collateral. So of Action for Diſturbance Common. 3 *Keb.* 820. *Sanders* and *Williams.* being againſt a Tort-Feaſor no Title is neceſſa-. In Actions for Diſturbance of Toll in a Fair ere needs no Title by Patent or Preſcription ainſt the Tort-Feaſor, but againſt the Owner the Soil a Title muſt be made. 3 *Keb.* 528. *John* and *Moody.*

Cap. XXV.

Venue, *or from what Place the* Venire *ſhall ariſe.*

IF a Treſpaſs is alledged in *D.* and *null tiel Vill* is pleaded, the Jury ſhall come *de corpore Comitatus*; but if it be alledged in *S.* & *D.* and *null tiel de Vill. de D.* is pleaded, the Jury ſhall be *de Vicineto de S.* for that is the more certain. *Litt.* 125. b.

The Plaintiff declares, That he is and hath been for twenty Years paſt an Inhabitant in *L.* in *Parochia B.* and the Inhabitants of *L.* preſcribe to have a Common Way, *&c.* to go and ride from *L.* to the Pariſh-Church of *B. præd.* on Lord's Days and Feſtivals, *&c.* and ſhews the Way through divers Cloſes in *L.* and *Gomerſall*, and ſhews a Diſturbance by the Defendant in making a Ditch in one of the Cloſes in *Gomerſall.* The Defendant pleads *Non culp.* and found *pro Quer.* The *Venire fac.* was quaſht *per Cur.* becauſe it was *de Gomerſall* only, and a new one awarded *de L. Gomerſall & B. Hutton Rep.* 27. b. *Reyner* and *Waterhouſe.*

The Plaintiff counts, he was ſeized of an Houſe and twenty Acres in *T.* and that he and all thoſe whoſe Eſtate he hath, have had a Common in ſeven Acres in *T.* and have had a Way leading through the ſaid ſeven Acres and from thence into one Common Way leading to *B.* and from *B.* to *Br.* and that the Defendant had plowed thoſe ſeven Acres. On *Non culp.* pleaded, the *Venire* was from *T.* only, and *per Cur.* the Trial is good; for *Non culp.* is properly a Denial of Treſpaſs and Diſturban-

ance, and though he ought to prove Title to the Way, yet it is ſufficient if he prove Title to the Way by and through the ſeven Acres upon Evidence; and it is not neceſſary the *Venire* ſhould be from all the Towns through which he claims his Way; yet if the Preſcription had been traverſed, then he ought to prove all the Way, and the Tryal ſhall be from every Town. *Hutton p.* 39. *Clarke* and *Wood. Hob. p.* 305. *meſme Caſe.* The ſhowing that part of the way in *T.* is a Treſpaſs there, though it went no further; ſo as the reſt of the way is indeed but Inducement to the Action, and the Way might have been only laid to and from the Houſe and that piece of Common, both in *T. Vide* 2 *Rolls Rep. p.* 122. *Lowe*'s Caſe. In Iſſue on Preſcription it need not be from all the Places. *Vide ſupra in Chymin.* The Places from which and to which ſhall have ſufficient Conuſance. *Palmer*'s *Rep.* 35. *More*, Sir *G. Henage* and *Curtis.*

The Place of the Treſpaſs is alledged in the Pariſh of *H.* and the *Venue* is *de H.* generally, and good. A Pariſh, Village or Town ſhall be intended all one. 1 *Rolls Rep.* 27. *Spencer*'s Caſe.

If one claim a Common in *Dale* appendant to the Manor of *Sale*, the *Venue* ſhall be from both. *Rolls Rep.* 122.

If a Battery be laid in *D. in Com. N.* with a *Continuando* in *Midd. Venire* ſhall be of both Counties. *More*, *Michel* and *Long*'s Caſe.

The Plaintiff declares of taking Corn ſevered from 9 Parts at *E.* in *Com. W.* As to part, the Defendant pleads *Non culp.* as to the reſidue, he reads a Deviſe of the Parſonage, *&c.* from *T. L.* the Defendant at *W.* in the ſame County, and to enable the Deviſe of the Tithes in *E.* alledges *E.* to be an Hamlet of *W.* and on *non demiſit*, being in Iſſue the *Venue* was from *W.*

only. *Per Cur.* the *Venue* is miſawarded; for when the Plaintiff declares of a Treſpaſs in *E.* this by general Intendment is preſumed to be a Village, from which the Matter in Iſſue ought to be tryed: and though the Defendant had alledged *E.* to be a Hamlet, yet this was only to enable the Deviſe, and not to extend to the Iſſue before, *Non Culp.* as to part; for in this Iſſue the Parties both agree that *E.* is a Village, and this is a perfect Iſſue in it ſelf: But if the Defendant had pleaded the Deviſe to all the Treſpaſs, there the *Venue* had been good. *Yelv. p.* 77. *Lapworth* and *Weſt.*

Treſpaſs againſt two Defendants for entring his Cloſe (againſt *S.* and *D.*) *D.* had Judgment againſt him on *Nihil dicit.* *S.* pleads *Non Culp.* upon which is awarded a *Ven. Fac.* between all the Parties *tam ad triandum exitum quam ad inquirend. de dampnis*, and ſo was the *Habeas Corpus* and *Diſtringas*; but the Plaintiffs (*D.* being dead) take their Record of *Niſi prius* againſt *S.* only, and he is found guilty. The *Venire* was vitious; for there was no Iſſue to be tried between the Plaintiff and *D.* the Writ ought to have mentioned only the Iſſue between the Plaintiff and *S.* and to have a Writ of Enquiry between the Plaintiff and *D.* according to the award of the Roll, which is the Ground of the *Scire Fac. Yelv. p.* 109. *Lane* and *Sands* againſt *Scullard* and *Danby.*

Treſpaſs for breaking his Cloſe called *G.* in *Woodthorp* in *Com. D.* The Defendant pleads, That Cloſe is known as well by the Name of *D.* as by the Name of *G.* and time out of mind had been Parcel of the Manor of *Wingerworth.* The Plaintiff maintains his Declaration, and traverſeth that the Place where, *&c.* is not Parcel of the Manor and the *Venire* was awarded out of *Woodthorp* only. It's a Mis-trial; it ought to have been as well from

the Manor of *Woodthorp*: For though the Parties are agreed, that the Place where, *&c.* lies in *Woodthorp*, yet this being ſuppoſed in Fact to be Parcel of the Manor of *Wingerworth*, the *Viſne* of the Manor by Intendment ſhall have better Conuſance of this than the Village of *Woodthorp* only. *Yelv. p.* 182. *Kniveton* and *Royley.*

On Rule to change the *Venue* from *L.* to *W.* there ought to be *niſi cauſa oſtenſa fuit in contrarium* by ſuch a Day, and none being, the Plaintiff may come before Plea entred, and ſuggeſt that he will give no Evidence, but where the Action is laid, and ſo hinder the changing it. But Serjeant *D.* praying it after Plea enter'd upon the Roll came too late, *per Cur.* 1 *Keb.* 859. *Ferrers* and *Jaquet.*

Treſpaſs for Faux Impriſonment, ſuppoſing the Impriſonment *apud W.* The Defendant juſtifies by reaſon of a Warrant upon a *Capias* directed to the Sheriff of *Suff.* made at *Bury*, and upon *ſon tort demeſne*, a *Venue* was from *W.* only. The Trial was ill; it ought to have been from *Bury* and *W.* a *Ven. Fac. de novo* was awarded. *Cro. Jac.* 95. *Sturgis Judkin.*

Faux Impriſonment in *Suffolk.* The Defendant juſtifies, That a Commiſſion of Rebellion iſſued out of the Chancery in *Middleſex* againſt the Plaintiff, directed to *B.* and the Defendant as his Servant and by his Command, arreſted the Plaintiff, *&c.* the Iſſue was joined *de ſon tort demeſne*, and it was tried in *Suffolk*; and it's Error, becauſe this Iſſue ought as well to have been tried by a Jury of *Middleſex* as of *Suffolk*; for one principal part of the Cauſe (*viz.*) the awarding the Commiſſion is here in Iſſue, for the Root of the Juſtification ariſeth from thence, and without that the Command is of no value. But the moſt apt Iſſue had

been to traverſe the Record or the Matter in Fact, and not both together. *Cro. Eliz.* 844. *Downing* and *Bayward*.

Treſpaſs of Battery. One of the Defendants pleads Not guilty, the other juſtified; the Iſſue againſt him was *de ſon tort demeſne*, and though but one *Venire* to try theſe two Iſſues, yet it's good enough, and it's uſual. *Cro. Eliz. p.* 866. *Conb.* verſus *Carew* and *Day*.

Battery in *Somerſetſhire* juſtified by Proceſs in *Dorſetſhire*, and tried in *Somerſetſhire*. *Quære* if this be within the Words of 16 and 17 *Car*, 2. *c.* 8. there being three Judgments in the Point. *Croft* and *Winter*, *Croft* and *Bayes*, *Wiſe* and *Adderly*: But the Court declared they were not ſatisfied with theſe Judgments. 3 *Keb.* 612, 552. *Maſters* and *Wood*.

In Treſpaſs *quare clauſum fregit*, the *Venire Fac.* was awarded *in placito tranſgreſſionis ſuper caſum*, and the Iſſue Roll was *in placito tranſgreſſionis tantum*; and it was agreed it ſhould be amended; for the Iſſue-Roll is the Warrant of the Clerk. *Litt. Rep.* 54.

Action of Battery is brought againſt two, and one dies before Trial, and it is entred upon the Roll: But the *Venire fac.* is awarded againſt both, and Verdict found againſt both, and Damages aſſeſſed for them, it may not be amended. For it is not the Act of the Court, bnt of the Jury; ſo that no Damages may be ſevered. *Litt. Rep.* 55.

Treſpaſs for entring into an Houſe and into a Cloſe. Upon *Non culp.* pleaded, the Parties were at Iſſue on one of them, but not for the other; and Verdict *pro Quer.* Judgment ſhall be given for that which is found. 2 *Bulſtr.* 288. *Watts* and *Kempe*. *Quare*, *vide infra*.

Action

Action of Treſpaſs for breaking his Cloſe in two Villages in two Hundreds; there ought to be Jurors from every Hundred. *Bendl. p.* 26.

Theſe Caſes I have cited to ſhew the Exactneſs of our Common Law in point of Trials; but they are moſt of them now over-ruled by the Statute of 16 and 17 *Car.* 2. *c.* 8. which enacts, *That after a Verdict Judgment ſhall not be ſtayed nor reverſed for that there is no right* Venue, *if the Cauſe be tried by a Jury of the County or Place where the Action is laid.*

CAP.

CAP. XXVI.

Iſſue, Verdict, Evidence.

THE Defendant juſtifies, That the Place is held of the Earl of *N.* as of his Manor of *W.* by Homage, *&c.* The Jury found that it was held of the Earl of *N.* as of his Manor of *P.* and good. For there is a Diverſity between Replevin and Treſpaſs; in Replevin, becauſe the Plaintiff is to have a Return, it behoves the Avowant to make a good Title *in omnibus*; otherwiſe in Treſpaſs, which is only in excuſe. *Yelv. p.* 148. *Goodman* verſus *Ayling*.

The Plaintiff declares of a Treſpaſs in an Acre of Land in *D.* and abutts it *Eaſt*, *Weſt*, *North* and *South*. Upon *Non culp.* pleaded, the Jury find the Defendant *Culp. in dimidio acræ infraſcript. Per Cur.* The Plaintiff ſhall have Judgment. Had the Jury found the Treſpaſs in a Foot of this Acre it had been good; and their finding the Treſpaſs in the Moiety of the Acre bounded, it ſufficeth in this Action, where Damages are only recovered: Had it been in Ejectment it had been ill; for it is not certain in what part the Plaintiff ſhall have his *Hab. Fac. Poſſeſſion*. *Yelv. p.* 114. *Winckworth* verſus *Man. Cro. Jac. p.* 183. *meſme Caſe*. Though the Treſpaſs was done in the Moiety, yet it may well be alledged to be done in the whole Acre.

Treſpaſs for entring into his Houſe and into his Cloſe; and one only was put in Iſſue, and Verdict for the Plaintiff. The Plaintiff ſhall have Judgment. 2 *Bulſtr.* 288. *Watts*'s Caſe.

Treſpaſs

Treſpaſs of Aſſault and Battery 1 *Aug.* 13 *Car.* 2. The Defendant juſtifies *per ſon Aſſault demeſne*, and Iſſue thereon. The Defendant gives in Evidence Aſſault and Battery by the Plaintiff, 2 *July* 13 *Car.* before, and that it was in his own Defence, and brings divers Witneſſes to prove it. The Plaintiff ſhews, That the Battery which he intended was 9 *July*, 13 *Car.* and produced divers Witneſſes to prove that. *Per. Cur.* It's good Evidence for the Plaintiff; and the Plaintiff need not make a ſpecial Replication, and ſhew that ſpecial Matter; and if another Day had been ſhewn in the Replication, it ſhould have been a Departure. *Cro. Car.* 514. *Thornton* and *Liſter.* It ſufficeth to ſhew in Evidence to be done at another Day, *ſans ſon Aſſault*, for the Day is not material.

What Evidence maintains the Iſſue.

Treſpaſs for breaking his Houſe in ſuch a Ward and Pariſh in *London.* Upon Not Guilty pleaded, the Jury found the Treſpaſs, and that the Houſe was in the Pariſh but not in the Ward, and it was held that this Verdict was for the Plaintiff: For the finding it was not in the Ward, was ſuperfluous, it being admitted by the Parties, and the Jury had not to meddle with it. *Cro. Eliz. p.* 283. *Haſſal* and *Juxon.*

In Treſpaſs of his Cloſe broken, if the Defendant ſaith that the Place where the Treſpaſs is ſuppoſed to be made is ſix Acres of Land in *D.* which are his Free-hold, and the Plaintiff ſaith that it is his Free-hold, and not the Free-hold of the Defendant. If the Defendant had ſix Acres in *D.* and the Plaintiff other ſix Acres, the Defendant may not give in Evidence that he made the Treſpaſs upon his own Land. *Dier fo.* 23. *Pl.* 147.

Treſpaſs

Treſpaſs for entring into his Houſe and Garden: And the Plaintiff gives in Evidence to prove the Diſſeiſin, Deſcent and Entry, *&c.* The Defendant ſhews to prove his Entry congeable, a Recovery againſt the Plaintiff in a Writ of Intruſion; and it was of an 100 Acres of Land, 20 Acres of Meadow, and ſaith nothing of the Meſſuage or Garden.

The Plaintiff declares of the taking of a parcel containing 18 yards, and other 20 yards, *& duarum aliarum parcellarum*; and the Jury finds as to 5 parcels of Cloth guilty, This Judgment was reverſt, for it ſhall not be intended, that one of the firſt Peices containing ſeveral yards, contained 5 parcels; and the Plaintiff declares of 4 parcels only, 2 *Rolls Rep. p.* 415. *King* and *Hoskins.*

The Iſſue joyned was *de injuria ſua propria abſque tali cauſa*, and the Jury found Not Guilty generally: The Verdict found the Iſſue argumentatively only and not directly; therefore its not good, *Stiles Rep.* 167. *Hobs* and *Blanchard.*

Treſpaſs againſt Baron and Feme, and delare that they beat a Mare of the Plaintiffs, *&c.* on Not Guilty. The Jury find, that the Wife beat the Mare, and for the reſidue they found for the Defendant. *Per Cur. Nil.cap. per billam*, for the Verdict is wholly imperfect; they have found the Wife Guilty of beating the Mare, and have given no Verdict as to this touching the Husband, either by way of acquittal or condemnation. Battery againſt Baron and Feme, ſuppoſing that they both beat the Plaintiff, and on *non Cul.* they find the Wife only Guilty of the Battery; this Verdict is againſt the Plaintiff, for now it appears that the Action of the Plaintiff is *faux*, and the Baron joyns only for conformity; and its not like

to

to a Battery charged on *J. D.* and *J. S.* for there one of them may be found Guilty, and the other acquitted as being ſeveral Treſpaſſors in Law, *Relv. p.* 106. *Drury* and *Dennis.*

Treſpaſs for entring of his Houſe and taking his Goods, The Defendant pleads *quoad* the Goods Not Guilty, *quoad* the Entry, that the Plaintiff's Daughter licenſed him, *&c.* and that the entred by that Licenſe. The Plaintiff ſaith *Non intravit per Licentiam ſuam*; he ought to have traverſed the Licenſe, and not the Entry by the Licenſe, or the Licenſe by it ſelf and not both together; its a negative pregnant. *Q.* if aided by the Statute of *Jeofails*, *Cro. Jac.* 87. *Myn* and *Cole.*

Treſpaſs *quare clauſum fregit averiis depaſcendo*, (viz.) *equis bobus vaccis porcis & bidentibus.* The Defendants pleads, *quoad* any Treſpaſs *cum aliquibus averiis præterquam cum duobus ſpadonibus & tribus vaccis* Not Guilty, and for them he juſtifies for Common; for the firſt Iſſue the Verdict found the Defendant Guilty *cum aliquibus averiis* as the Plaintiff counts; as to the ſecond Iſſue they found *pro Quer. Per Cur.* The Verdict is well enough, finding that he is Guilty *cum aliquibus averiis præterquam*, and is as general as the Count; and it is not material for what number or kind of Cattle, *Cro. Jac.* 662. *Elſton* and *Durrant.*

Treſpaſs of Aſſault, Battery and Wounding. The Defendant *quoad* the Wounding pleads Not Guilty, *quoad reſiduum* juſtifies by Warrant to Arreſt; the Iſſue was *de ſon tort Demeſne*, and as to that the Jury found that he Aſſaulted, Beat and Wounded him *de ſon tort Demeſne*, and finds not any thing upon the Iſſue Not Guilty by it ſelf; yet adjudged to be good, *Crok. Jac.* 854. *Burper* and *Baker.*

If in Treſpaſs the Defendant juſtifies by reaſon of Common in 6 Acres of Land, upon which the Parties are at Iſſue; and the Defendant in Evidence ſhews he hath Common in 40 Acres whereof the ſaid 6 Acres are parcel, the ſame doth not maintain his Title, but the Iſſue ſhall be found againſt him, 1 *Leon. p.* 44. *Kimpton* and *Bellamies* Caſe.

In Treſpaſs the Plaintiff declared, that the Defendant had diſtrained his Horſe, and travelled riding upon him; and the Jury find the Defendant did diſtrain the Horſe and kill him, the Plaintiff cannot have Judgment. 3 *Leon. p.* 91.

Upon Not Guilty in Treſpaſs. The Queſtion was, If he might give in Evidence, that at the time of the Treſpaſs, the Freehold was to ſuch an one, and he as his Servant, and by his command entred. And by *Coke* it might, and ſo adjudged in *Trevillian's* Caſe, for if he by whoſe commandment he entreth hath right, at the ſame inſtant that the Defendant entreth the right is in the other, by reaſon whereof he is Not Guilty as to the Plaintiff, and Judgment accordingly, 1 *Leon. p.* 301. *Deerſly* and *Nevill.*

Treſpaſs for entring into his Houſe and Land. The Defendant pleads, it was the Free-hold of *J. B.* and he entred as her Servant, and by her command, and the Iſſue was, if it were her Free-hold or not: The Jury find it was the Free-hold of the Plaintiff for two parts, and the Free-hold of the ſaid *J.B.* for the third part. *Per Cur.* The Plaintiff cannot have Judgment on this Verdict; for tho' the Iſſue is found againſt the Defendant, (*viz.*) that all was not the Free-hold of *J.B.* yet it appearing a Tenancy in Common, ſo that the Plaintiff cannot maintain this Action; Judgment ſhall be given for the Defendant. The Plaintiff could not have Judgment though this Tenancy in Common

mon was not pleaded, 3 *Leon.* 228. *Crok. Eliz. Bennington's* Caſe.

Treſpaſs for breaking his Cloſe, beating his Servant and carrying away his Goods. The Jury find Sir *T. B.* was ſeized of the Land where, *&c.* and leaſed the ſame to the Plaintiff and one *A.* which *A.* aſſigned his Moiety to *C.* by whoſe commandment the Defendant entred. *Per Cur.* The Tenancy in Common between the Plaintiff, and him in whoſe Right the Defendant juſtifieth might be given in Evidence; but the Verdict not extending to all the Points of the Declaration, but only to the breaking of the Cloſe without enquiey of the Battery, *&c.* it was void, and a *Venire de novo* awarded.

In Treſpaſs for depaſturing his Paſture. The Defendant Preſcribes, *&c.* to have Common *pro omnibus ovibus* Levant and Couchant on his Manor of *H. &c.* the Preſcription is *pro ovibus*, and the proof falls out to be, that they have Common for their own proper Sheep only, and for lack of the word (*ſuis*) it was reſolved, that the Evidence does not maintain the Preſcription, for by the Preſcription Sheep in Agiſtment, or otherwiſe Levant and Couchant ought to have Common, which is not warranted by the proof. *Palmer* 362. Earl of *Devon* againſt *Eyre.*

ISSUE.

Where Demurrer is to part, and pleading to Iſſue for the other part. The Court will try the Demurrer firſt, and the reaſon of the Tryal of the Iſſue laſt is, becauſe then the Jury ſhall aſſeſs Damages for all. *Palmer* 517. *Huntly* and *Bridges.*

In

In Demurrer, diſcontinuance of part is a diſcontinuance of the whole; *aliter*, when they will plead to Iſſue in Treſpaſs. *Pal.* 395.

VERDICT.

Treſpaſs for the taking his Tunick and Menteau, and on Not Guilty ſpecial Verdict. The Jury found the Defendant as Conſtable took the Tunick for a Tax, but found nothing as to the Manteau, and for this the Court held all diſcontinued, 3 *Levins* 55. *Barrow* and *Hagger's* Caſe.

CAP.

CAP. XXVII.

Of Damages.

AS to the Title of Damages in Treſpaſs (which makes a great Figure in our Books,) I ſhall reduce all to ſome certain Rules and Differences, and cite plain Caſes for the more diſtinct underſtanding thereof, which ſhall be pertinent.

Of finding Damages intirely where they ſhould be ſevered.

1. At the Verdict, if the Counſel for the Plaintiff ſee that his Declaration is in ſome parts uncertain, or that the Plaintiff had no Cauſe of Action for the one part, it will be done wiſely to cauſe the Damages to be ſevered, and not to ſuffer the Jury to give intire Damages. As Treſpaſs *Quar. clauſ. fregit & piſces ſuos cepit*, without ſhewing the number (which is uncertain) on Not Guilty pleaded and found *pro Querente*, and entire Damages given its ill; for when the Jury have found the Defendant Guilty generally *de Tranſgreſſione in Narratione*, this extends to both Treſpaſſes. They ought to have ſevered the Damages, (*viz.*) ſo much for the Fiſhes, and ſo much for the Cloſe broken, and then the Plaintiff ſhould have recovered Damage for the breaking his Cloſe with Coſts. 5 *Rep.* 34, 35. *Playter's* Caſe, 3 *Bulſtr.* 198.

A Caſe at the Aſſizes before Judge *Berkly* was, Treſpaſs for the breaking his Cloſe and eating his Graſs *cum averiis ſuis ſcilicet*, Oxen, Sheep, Hogs, *avibus Anglice* Turkeys. He held Turkeys are not compriſed within the general word (*averia*)

which is an old Law word, and theſe Fowl came but lately into *England*, and Damages were ſevered for the reaſon aforeſaid.

So, if the Jury aſſeſs entire Damages for two Treſpaſſes, and for one no cauſe of Action is given, the Verdict is not good; as the Plaintiff declares, *quare Def. inſultum ſuper eum fecit nec non unam equam pretii 6 l. a perſona ipſius (querentis) cepit*, The Declaration is not good as to the Mare, for the Plaintiff doth not ſuppoſe any property in the Mare, but he ought to have ſaid *equam ſuam*, or *equam ipſius querentis*, for as it is laid the Mare may be the Defendants, and then the taking is lawful, and the Jury aſſeſſing intire Damages for both Trepaſſes, its naught, *Yelv. p.36. Purcell* and *Bradly*.

Treſpaſs of breaking his Cloſe and beating his Servant, and doth not ſay *per quod Servitium amiſit*. The Defendant pleads *Non cul.* and the Jurors find him guilty, and aſſeſs Damages intirely. *Per Cur. Quer. nil capiat per billam. Vid. Cro. Car.* 196. *Salman* againſt *Percivall*, there was no cauſe of Action for one.

In Battery againſt Baron and Feme; Baron juſtifies, for that the Plaintiff aſſaulted his Wife, in Aid of whom, *&c.* the Feme by her ſelf pleads *ſon Aſſault, &c.* both Iſſues were found for the Plaintiff, and intire Damages given; and ill, for the Feme by her ſelf cannot plead, and a Repleader was awarded. *Stiles Rep.* 345. *Jarvis* and *Lucas*.

Treſpaſs againſt three. 1. Pleads generall *Non cul.* 2. Pleads as to part *Non cul.* 3. to another part pleads *Non cul.* The Jury gave intire Damages, it was Erroneous. 1 *Bulſtr. p.* *Mill's* Caſe.

If the Jury give intire Damages, where one part is not put in Iſſue, its Erroneous. As Treſpaſs of Aſſault, Battery and Wounding, *Quoad* the force the Defendant pleads *Non cul.* and *quoad* the Aſſault and Battery a ſpecial juſtification. The Jury found the Defendant guilty *de injuria ſua propria*, and gave Damages to 20 *s.* its Erroneous, the Wounding was not in Iſſue; the Plaintiff might have Demurred upon the Plea. *Siderfin p.* 96. *Calvert* and *Arnold.* In Treſpaſs the Defendant juſtifies as to one thing, and pleads Not Guilty to another, and they are at Iſſue, and the Jury enquire of one thing only, and tax the Damages for both intirely, the Verdict is ill. 5 *Rep.* 108. *Pooly* and *Oſborn.*

Treſpaſs of Aſſault, Beating and Wounding againſt four Perſons; three of them plead Not Guilty, the fourth pleads Not Guilty to part, and juſtifies for the reſt, (*viz.*) the Wounding, and is found guilty as to the Wounding only. Verdict was found generally for the Plaintiff, and intire Damages aſſeſſed; its Error, for as to the fourth Perſon Damages ought to have been ſevered in relation only to the Wounding, and not as it is, for ſo Damages ſhould be given twice for the ſame thing: Firſt againſt the three, and then againſt the fourth only. *Stiles Rep.* 5. *Whitwell* and *Short.*

Treſpaſs for breaking his Cloſes, ſpoyling his Graſs and chaſing his Cattle *tunc & ibidem* to a Pound, *&c.* and by default the Judgment is *de Tranſ. in Clauſis præd.* and nothing of the Driving and Impounding; in the Executory Judgment there is intire Damages given *pro Tranſ. præd. in clauſis præd.* not ſaying any thing of the chaſing and impounding which ſhall be intended out of the Cloſes, (*viz.*) in the Vill; its Error inarable. 1 *Keb.* 552. 564. 653. *Hardy* and *Taylor.*

Where a Treſpaſs is repugnant (as 20 *H.* 6. with a Continuando beyond the Teſte of the Writ) and the Jury gives Damages for all, its intended they only give Damages for that which they lawfully may, 1 *Keb.* 257.

Treſpaſs continued many years, and the Statute of Limitations pleaded, the Jury gave Damages for the laſt ſix years, and the Plaintiff had Judgment. 3 *Mod.* 110 *Aldrige* and *Duke.*

If the Plaintiff bring Treſpaſs, and lay Damages to an 100 *l.* and the Jury find 50 *l.* he ſhall be amerced for the reſidue, although that the Tort be entire. *Pal.* 270, 271.

Of ſevering the Damages, where they ſhould be intire.

In Treſpaſs againſt divers Defendants; they plead *Non cul.* or ſeveral Pleas, and the Jury find for the Plaintiff in all, the Jury may not aſſeſs ſeveral Damages againſt the Defendants. Treſpaſs of Battery, two of the Defendants plead *ſon Aſſault demeſne*, the third Not Guilty, both Iſſues were found for the Plaintiff, and ſeveral Damages found againſt them who pleaded ſeverally, and it was ruled to be ill; for it is one joynt and entire offence by the Plaintiff's Action. But in Treſpaſs againſt two, if the Jury find one Guilty at one time, and the other at another, or the one be found guilty in part, the other in all, there ſeveral Damages may be taxed. 11 *Rep.* Sir *John Heydon*'s Caſe, *Cro. Eliz.* 860. *Auſten* againſt *Willward, & alios.* But in Aſſault and Battery againſt two, they plead Not Guilty; the Jury ſhall ſever the Damages, but the Coſts ſhall be intire. 1 *Bulſtr.* 157.

So in Treſpaſs of Battery and Wounding againſt two, the one pleads to all except the Wounding, that it was in his own defence, and to the Wounding Not Guilty; the other juſtifies all in his own defence; and in Iſſue upon thoſe Pleas, the Jury found the firſt guilty of the Wounding, and the other Iſſue againſt him alſo, and aſſeſs Damages 20*l.* and found the Iſſue alſo againſt the other Defendant, and Damages 100 *l.* and gave intire Coſts againſt both. And Judgment accordingly; its Error, for there ought to have been but one Judgment for the Damages, and he ought to have made his Election againſt whom he would have taken his Judgment; this Action is for one joynt Treſpaſs, therefore one joynt Damage ought to have been given by the Jury againſt both; and although the Defendants had ſevered themſelves in Plea, yet when they are both found guilty of one and the ſame Battery, one Judgment only ought to have been given. *Cro. Jac.* 118. *Crane* and *Hill* againſt *Humerſtone.*

In Treſpaſs againſt divers which plead ſeveral Pleas triable by the ſame Jury, if the Jury ſever the Damages, all is vitious. *Auſtin*'s Caſe cited, 11 *Rep.* 7. a. in Sir *J. Heydon*'s Caſe.

In Treſpaſs of Aſſault and Battery againſt two, if one plead to the Iſſue and the other Demurrs, yet the Damages ſhall be aſſeſt intirely againſt both of them. 2 *Sanders* 26. in *Jefferſon* and *Dawſon*'s Caſe.

Aſſault and Battery againſt two, *ad damnum* of the Plaintiff. The Defendants plead *Non cul.* the Jury found for the Plaintiff againſt both Defendants, and the Jury aſſeſs ſeveral Damages to the Plaintiff, (*viz.*) ſo much againſt the one, and ſo much againſt the other Defendant ſeverally and intre Coſts. *Per Cur.* Its well done, becauſe the

Battery of the one cannot be the Battery of the other, and the Battery of the one may be greater than the Battery of the other; *aliter* in Treſpaſs for cuting down of Trees. 1 *Bulſtr. p.* 157. *Samſon* againſt *Cranfeild* and *Upton.*

Inqueſts on ſeveral Venires, *which ſhall Aſſeſs the whole Damages.*

In Treſpaſs againſt two, one appeareth and pleadeth *Non cul.* the firſt Inqueſt ſhall aſſeſs Damages for the whole Treſpaſs by both Defendants; and afterwards the other appeareth and pleadeth Not Guilty, and is found Guilty; the finding of Damages by the firſt Inqueſt to which he was not party, ſhall bind him. 10 *Rep.* 119. a. In ſuch Caſe there are ſeveral *Venires* awarded, yet the Inqueſt which paſſed firſt ſhall aſſeſs Damages for the whole; and the Defendant which laſt pleaded, ſhall be charged with the Damages taxed by the firſt Inqueſt, and ſhall be contributory. 1 *Leon.* 122. 11 *Rep. Heydon's* Caſe.

Election of Damages.

Aſſault and Battery againſt *W.* for Battery by him *Simul cum J.* and Judgment againſt him, and Damages levied; and after another Action is brought againſt *J.* and he is found guilty, and good, for the Court ſhall never intend this to be the ſame Battery; but if he will take Advantage of the firſt Recovery, he ought to ſhew it in pleading. But if there be but one Original againſt both, and ſeveral Declarations, then when he hath recovered and had Damages againſt one, he may not have more Damages againſt the other; but if he recover againſt the other, before he had Execution againſt the firſt, there he hath Election *e melioribus damnis.*

damnis. Againſt joynt Treſpaſſors there can be but one ſatisfaction, therefore if they be ſued in one Action, tho' they may ſever in Pleas and Iſſues; yet one Jury ſhall aſſeſs Damages for all, when he hath taken one ſatisfaction he ſhall take no more, and if he require two an *Aud. quer.* lies. *Lit. Rep. fo.* 37. *Watſon's* Caſe, *Hobart* 66. *Cook* and *Jenner.*

H. brought *faux* Impriſonment againſt *Anthony Mildmay* and two others; the two laſt plead they were Juſtices of the Peace, *&c.* The Plaintiff replies *non habetur tale Record.* The Defendant Demurrs, and adjudged againſt them: Sir *Anthony* pleads another Plea on which they are at Iſſue, and before this Iſſue tried 200 *l.* Damages are found againſt the others by Enquiry. The Plaintiff may relinquiſh Sir *Anthony*, and have Judgment againſt the other two. 1 *Rolls Rep.* 395. *Headly* againſt Sir *Anthony Mildmay.*

Of the Writ of Enquiry.

In enquiry of Damages on a Confeſſion, or a *non ſum informatus*, or *nil dicit*, the Plaintiff need not prove the Goods taken, becauſe the Writ commands only the value to be enquired and no more. And *per Cur.* In ſuch caſe the Judges, if they will trouble themſelves may aſſeſs Damages without any Writ; *aliter* where *Non cul.* is pleaded, for there the Treſpaſs is denied, which ought to be tried by the Jury, and there the property and the value ought alſo to be proved. *Yelv. p.* 151. Sir *Fr. Goodwin's* Caſe.

The Court may grant a Writ of Enquiry on a Demurrer adjudged for the Plaintiff in a ſpecial Plea to part, and Not Guilty for the reſidue, before the Not Guilty tried, 1 *Leon.* 141. *Ward* and *Blunt.*

In a ſpecial Demurrer, and nothing ſaid as to part of the Treſpaſs, if a Writ of Enquiry is for the whole, its Erroneous. As Treaſpas for breaking his Houſe, and taking and carrying away his Goods. The Defendant juſtifies all: The Plaintiff *quoad fract. domus & caption. des biens nec non materia in ea content.* Demurrs. The Defendant joins *in hac forma quia placitum præd. quoad fract domus & caption des biens* is ſufficient; and Judgment, and Writ of Enquiry and Damages aſſeſt. Judgment was reverſt, becauſe in the offer of the Demurrer *ex parte quer.* nothing is ſaid but to the breaking the Houſe and taking the Goods; and although the words Subſeqnent, *nec non materia in ea content.* goes to all the Matter in the Bar; yet the Defendant joyns in Demurrer ſpecially with the Plaintiff, and ſaith nothing of the carrying away, and as to that nothing is put to the Judgment of the Court; and the Enquiry being for the whole, its Erroneous. *Yelv. p.* 5. *Johnſon* and *Turner.*

In Treſpaſs the Defendant pleads in Bar. The Plaintiff replies, and Demurrer was upon the Replication, and adjudged for the Defendant. The Plaintiff brought Error and that Judgment was reverſed, and adjudged that the Plaintiff *recuperet*, and the Record remanded: The Plaintiff ſhall have a Writ to Enquire of Damages. *Crok. Jac. p.* 206. *Faldo* and *Ridge.*

Treſpaſs againſt certain Perſons who plead Not Guilty, and at the *Niſi prius* the Defendants juſtify as Overſeers of the Poor, *&c.* and ſhew the ſpecial matter in Evidence *per Stat.* 43 *Eliz. c.* 1. and afterwards the Jury was Sworn, and the Plaintiff was Non-ſuited. The Court of *King's Bench* granted a Writ of Enquiry of Damages for the treble Damages, becauſe the ſame Jury could not aſſeſs the Damages. 1 *Rolls Rep.* 272.

Brevi

Breve de Enquiry ſuper judicio in Treſpaſs. Ra. Entr. 630. 2 *Br.* 61.

Simile poſt novel Aſſignment. Br. 126.

Simile recitando judicium per defalt. poſt Lilo. Ra. Entr. 631.

Simile ſur nichil dicit Lilo. Ra. Entr. 631.

Of Mitigation or increaſe of Damages.

If a *Mayhem* be not made directly by the Defendant *ſed potius* by accident, the Court will not encreaſe Damages. Treſpaſs *quare inſultum fecit & male tractavit* the Wife, *& equam* whereon the Wife Rode *percuſſit*, ſo that ſhe was caſt to the Ground, and another Horſe trode on her, ſo that ſhe loſt the uſe of three of her Fingers, and 8 *l.* Damage, the Court would not increaſe them, *Siderf. p.* 433. *Burford* and his Wife againſt *Dadwell.*

Aſſault, *&c.* againſt two, one appears and its found againſt him, and Damages taxed, and upon view of the *Mayhem* encreaſed to 40 *l.* and the other had a Veredict againſt him, and Damages taxed, the Council moved to increaſe Damages againſt the other Defendant upon an other view. The Court would not, they can have the view but once in this Action; *aliter*, if ſeveral Actions had been brought. *Lit. Rep.* 51, 52.

Per Curiam, In the Caſe of *Angell* and *Shatterton*, *Siderfin* 108. where the Particulars of *Mayhem* are not expreſt in the Declaration, the Court may not increaſe the Damages upon the View, unleſs the Judge, before whom it was tried, of the ſame Court certify the Particulars, and affirm theſe are the *Mayhems* they gave in Evidence. So *Stiles Rep.* 345. *Jarvis* and *Lucas.* The Wounding muſt be particularly expreſſed in the Declaration,

tion, that the Court may judge of it by the Record, and not upon bare Averment.

In Aſſault, Battery and Wounding, the Jury on Writ of Enquiry found 200 *l.* the Court, upon View of the Serjeants, and Examination of Surgeons and Witneſſes, increaſed the Damages to 400 *l.* *Stiles Rep.* 310. *Davis* againſt the Lord *Follyott.*

Damages were increaſed by the Court on the loſs of a Thumb. 1 *Leon.* 139. *Mallett's* Caſe.

Judgment on *non ſum informatus*, and a Writ of Inquiry in Battery, it was moved to mitigate Damages. *Per Cur.* They will never alter the Damages where the Party had alſo given Evidence at the Enquiry. *Litt. Rep.* 150. *Stanley's* Caſe.

Sometimes, at the Prayer of the Defendant, when exceſſive Damages are found, or any Miſdemeanours alledged in the Plaintiff, *&c.* the Court will relieve the Defendant in granting out a new Writ, but to the Plaintiff never, becauſe the ſuing out the Writ is his own Act.

Treſpaſs was brought *de Clauſo fract. Continuando* for ſix Years, and on *Nil dicit* the Plaintiff had Judgment, and the Jury found but ten Shillings Damage on a Writ of Inquiry. The Plaintiff ſhewing the Land was worth four Pound *per An.* prayed the Court the ſaid Writ might not be received, and to have another for the *melius* Inquiry of the Damages, but it was denied. 2 *Leon. p.* 214.

It's a good Expreſſion in my Lord *Hobart*, *p.* 99. *I do not regard what the Wrong-doer gains by his Wrong, but what the Owner loſeth by it; when the Law runs to repair the Wrong.*

A Motion was made againſt a Judge of an Inferior Court of Record, for Increaſing upon a View the Damages, and in Action of Treſpaſs and Battery, to ſo much more than was given by the Jury

Jury. *Per Cur.* The proper way to reform it is by a Writ of Error; for none but the Courts at *Weſtminſter* can increaſe Damages but on view. 1 *Vent.* 353.

Incluſive Damages.

In all caſes of Treſpaſs, the ſpecial Matter for which Damages ſhall be given ought to be pleaded (as in Treſpaſs for taking away an Horſe, *&c.* no Evidence ſhall be for other Matter than this which is expreſt in the Declaration.) except when the Matter ariſeth *ex turpi Cauſa*, as Treſpaſs *quare domum fregit, & alia enormia*, &c. and the Jury gave 60 *l.* Damage; and it was moved for a new Trial becauſe of the outragious Damages. And upon Affidavit that the Jury intended great part of the Damages for the Injury the Defendant did to the Plaintiff's Daughter, under Colour that he would marry her, the Plaintiff had Judgment; for this is *ex turpi Cauſa*, and this may be given in Evidence on ſuch general Declaration under the Words *alia enormia*; becauſe the Law will not compell the Party to ſhew this of Record. *Sid. p.* 225. *Sippora* and *Baſſet.*

Treſpaſs for taking away an Horſe going to Market; the Loſs of the Market ſhall be in Damages beſides the Value of the Horſe.

In Treſpaſs for cutting an Hole in the Plaintiff's Wall, and making a Pair of Stairs, *per quod* the Plaintiff broke his Arm; and Damages were recovered for all. *Tremenher's* Caſe. 3 *Keb.* 91. 92.

The Jury giving more Damage than ought to be.

Treſpaſs of Aſſault, Battery and Wounding. The Defendant, *quoad* the Battery and Wounding pleads

pleads *Non culp.* and *quoad* the Aſſault juſtifies. The Iſſue was on *ſon tort demeſne*; the Jury found both againſt the Defendant, and for Battery and Wounding 6 *d.* Damage, and for the Aſſault one Penny. This is not good, but was reverſt in Error; for the Aſſault was included in the firſt Iſſue. *Cro. Jac.* 251. *Candiſh*'s Caſe.

When the Jury find more Damage than the Plaintiff hath declared, or more than the Plaintiff declares, and aſſeſs Damage for, it's Error. *Hob.* 187. *Co. Entr.* 643. But,

The Plaintiff in his Declaration counts to his Damage of 40 *l.* The Jury find 40 *l.* and Coſts 20 *s.* which was increaſed by the Court to 5 *l.* more. This is not Error. *Cro. Jac.* 297. *Dawks* and *Pitfield.* 13 *H.* 7. 16. denied for Law.

In Treſpaſs the Jury gave half a Farthing Damage, and good. 2 *Rolls Rep. p.* 19. *Marſham* and *Buller.*

In Treſpaſs the Plaintiff declares to his Damage of 100 *l.* the Jury find 150 *l.* he ſhall recover but 100 *l.* but if Judgment be entred for him for 150 *l.* it is Error. The Plaintiff ſhall recover Damages according to his Count. 20 *Ed.* 6. 4, 7. 42 *Ed.* 3. 7. 13 *H.* 7. 16, 14. 1 *Bulſtr. p.* 49. *Hoblins* and *Kimble.*

If the Jury gives Damage for that which is not found by them, all is void. As, Treſpaſs for Beating, Wounding and Impriſoning. The Defendant pleads, as to the Beating and Wounding, Not Guilty; as to the other he juſtifies as Conſtable. The Jury find the Juſtification good, but nothing as to the other Matter; and yet aſſeſs Damages to the Plaintiff for the Wounding, for which they did not find the Defendant guilty. 1 *Bulſtr.* 64. *Simſon* and *Clay.*

When the Plaintiff alledgeth two things, and an Action is brought for both of them, and Damages

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mages given generally, theſe ſhall be ſaid to be given for them both. *Vide* 14 *Eliz.* Action for beating him and his Servants, omitting theſe Word (*per quod Servitium ſuum amiſit*) and Judgment and Damages given generally. There it was ſaid it ſhall be intended theſe Damages were only given for the Battery. 3 *Bulſtr.* 198. *Morris* and *Baker.*

In Treſpaſs in *Lancaſter* the Plaintiff declares for Aſſault, Battery and Wounding. The Defendant pleads *quoad* Force, *Non culp.* and *quoad* Aſſault and Battery, That he was removing a Market-Croſs, *&c.* and the Plaintiff interrupted him, *per quod molliter manus impoſuit.* And the Jury found the Plaintiff Guilty *de injuria ſua propria*; and ſo recite the entire Declaration of Aſſault, Battery and Wounding, where the Wounding was not in Iſſue; *& aſſidunt dampna occaſione Tranſgreſſion. præd. ad* 20 l. *Per Cur.* It ſhall be intended they have given Damages for all in the Declaration (*viz.*) the Wounding, which was not in Iſſue, and ſo it's Error: and the *Quæ eſt ead. Tranſgreſſio* doth not help this Defect: For the Court ſeeth it is not the ſame. *Siderf. p.* 96. *Calvert* and *Arnold.* 1 *Keb.* 464. *meſme Caſe. Hob.* 187. *Freeſton's* Caſe. *Co. Ent.* 643.

CAP.

CAP. XXVIII.

COSTS.

BY Stat. 23 *Car.* 2. *c.* 9. it is Enacted, *That in all Actions of Treſpaſs, Aſſault and Battery, and other Perſonal Actions, wherein the Judge ſhall not certify on the back of the Record, that a Battery was proved, or the Free hold or Title of the Land chiefly came in queſtion, the Plaintiff, if the Jury find the Damages under forty Shillings, ſhall recover no more Coſts than Damages; and if more Coſts be awarded the Judgment ſhall be void, and the Party ſhall have remedy for ſuch vexatious Suits.*

In Action of Treſpaſs *quare clauſum fregit*, and putting Stakes in the Ground, it was held that this was within the late Statute of no more Coſts than Damages; but if any thing had been taken away (of how little value ſoever) it had not been within the Statute. 2 *Ventr.* 48.

Treſpaſs for entring into his Cloſe and defouling his Graſs. The Defendant juſtifies by a Way. The Plaintiff replies *extra viam*; and Iſſue upon it, and Verdict *pro Quer.* And the Queſtion was, If he ſhall have full Coſts, or no more Coſts than Damage; becauſe (as was ſaid) no Title came in Queſtion upon the Trial; for the Way is admitted, and the Iſſue is only if he be *Culp. extra viam:* But *per Cur.* the Plaintiff ought to have full Coſts. For 1. There was a Title to the Way in Queſtion upon the Record, and ſo the Caſe out of the Intent of the Statute. 2. Upon the Iſſue *extra viam* the Title to the Way is in Queſtion, *ſcilicet*, of what Extent it is, *viz.* of

ten

ten or twenty Feet in Breadth, *&c.* all which came in queſtion upon the Trial, and the Plaintiff had full Coſts. 2 *Levinz.* 234. *Aſſer* and *Finch.*

In Treſpaſs for breaking, throwing down and ſpoiling of ſeven Stations (*Anglice* Standings) of the Plaintiff in *H. locat. & erect. pro venditione & expoſitione Bonorum & Merchandizarum diverſarum perſonarum ad mercat. de H. prædict. tempore mercat. ibid. tent. venientium pro rationabili ſalario per ipſas eid. Quer. proinde ſolvend. ad dampn. Sur non culp. Verdict pro Quer. Dampna* 2 d. *Miſ.* 40 *s.* The Queſtion was, if the Plaintiff ſhall have more Coſts than Damages upon the new Statute. Reſolved, *per Cur.* That the Statute doth not extend to this Caſe, or other-like Caſes of Goods. Sir *Tho. Jones* 232. *Smith* and *Betterton. Raymond* 487. *meſme Caſe.* For though he recover under 40 *s.* Damages, yet he ſhall have full Coſts.

In Treſpaſs for breaking his Net, the Defendant pleads Not Guilty. It was moved for full Coſts on 23 *Car.* 2. *c.* 9. But the Iſſue being Not Guilty, and there being no Title in the Declaration, nor not being certified by the Judge of Aſſize that the Title was in Queſtion, the Court refuſed to give more Coſts than Damages. 3 *Keb. p.* 121. Earl of *Pembroke* and *Weſhall.*

Treſpaſs (or in ſpecial Action on the Caſe) for Battery of his Servant *per quod Servitium amiſit.* Council prayed Coſts without the Judges ſigning the *Poſtea*, that the Battery was well proved: and *per Cur.* it was granted in *B. R.* on 23 *Car.* 2. *c.* 9. 3 *Keb.* 184. *Peake*'s Caſe.

Treſpaſs of Aſſault and Battery. Verdict found the Aſſault, and Not Guilty as to the Battery. And it was only of a Woman's ſhaking a Sword againſt the Plaintiff in a Cutler's Shop, being on the other ſide the Street. *Hales* certified the Aſſault well proved,

proved, and there was no more Coſts than Damage; and *Hales* ſaid, this was not within the Statute, unleſs the Battery had been found. 3 *Keb.* 283. *Smith* and *Newſham*, *p.* 292. But *p.* 303. the Court conceived no more Coſts be, *de incremento*, than Damages. And *p.* 335. the Aſſault only being certified and proved, and not the Aſſault and Battery, it's out of the Stat. 21 *Jac.* 6. being that no increaſe of Coſts be. But 23 *Car.* 2. *c.* 9. makes the Judgment of more Coſts void, which includes Coſts and Damages that hereby increaſe not by the Verdict of the Jury; for the Statute never intended that if the Damages found be 30*s.* and increaſe 10*s.* that then the Party ſhould have full Coſts, as he muſt if the Statute ſhould extend to the increaſed Coſts. The Action was begun in the *Marſhalſea*, and removed in *B. R.* by *Habeas Corpus*, and tried there, and Verdict of the Aſſault, and not of the Battery; yet ruled no more Coſts than Damages. *p.* 357. *Vide* this Caſe in 1 *Levinz.* 102.

Full Coſts were allowed in Treſpaſs begun in the Palace-Court, and brought into *B. R.* by *Habeas Corpus*, becauſe the Statute was made for advantage of the Defendants, that they ſhould not be troubled in the Superior Courts. 3 *Keb.* 423. *Gunnel* and *Skudimore.*

In Actions brought againſt Mayors, Juſtices of the Peace, Conſtables, *&c.* in Treſpaſs for any thing done by Virtue of their Office, if Verdict ſhall be for the Defendants, or the Plaintiff therein ſhall be Non-ſuit, or ſuffer any Diſcontinuance thereof, the Defendant ſhall have double Coſts. *Vaughan p.* 113. *Stiles* Caſe. *Vide Stat.* 21 *Jac. c.* 12. 7 *Jac. c.* 5.

CAP.

CAP. XXIX.

Judgments in Treſpaſs, and their Entries.

TReſpaſs againſt four. One of the Defendants, being an Infant, appeared by Attorney. It's erroneous, and the Judgment ſhall be reverſed againſt all. *Allen p.* 74. *Trin.* 24 *Car. Oates* and *Aylett. Stiles Rep. p.* 121, 125. *Aylett* and *Oates*.

Judgment in Treſpaſs againſt three. One died hanging the Writ, and Judgment againſt all was entirely reverſed. And 5 *Ed.* 4. 7. a. was denied for Law. *Moor* and *Scrivener's* Caſe cited in *Oates's* Caſe. *Allen's Rep.*

In all Actions *quare vi & armis*, if Judgment be given againſt the Defendant, there ſhall be Fine and Impriſonment; and the Judgment is, *quod Def. capiatur, i. e. quod capiatur quouſque finem fecerit.* 8 Rep. 59. *Beecher's* Caſe.

In Treſpaſs *vi & armis* Judgment is, *quod capiatur*; in Action on the Caſe, *in miſericordia.* But if the Bill in Treſpaſs be general, it may be uſed either way. *Hob. p.* 180. *Stiles* 130.

Where a Judgment is reverſed for an Error in Law againſt ſome of the Defendants, it is reverſed againſt all of them. But it ſeems to be otherwiſe where it is reverſed for a Matter in Fact, *per Rolls. Stiles Rep.* 121.

Judgment on default in Treſpaſs, *&c.* ought to be *recuperare debeat*; and becauſe it was *quod recuperet* in Inferior Court, it was reverſt for Error. *Keb.* 394. *Sheffield* and *Morris.*

The Plaintiff was non-ſuited in Treſpaſs after Evidence. The Judgment is, *quod nil cap. per billam.* It's no Error; for of late times all Preſidents

ſidents are in that manner. And further, the Judgment was, *quod querens & Plegij ſui ſint in miſericordia pro falſo clamore ſuo*, whereas it ought to have been, *quia non proſecut. ſunt*: for it ought not to be *pro falſo clamore*, but after a Verdict or Judgment on Demurrer. *Cro. Jac.* 213.

On *Non ſum informatus*, or upon *Nihil dicit*, Judgment for the Plaintiff; and a Writ of Enquiry iſſued out, and was retorned. It was moved that the Writ ſhould not be filed, becauſe the Plaintiff at the time of the Enquiry did not prove that they were his Goods, but proved only the Value of them. But, *per Cur.* the Plaintiff is not bound to prove his Property in either of theſe Caſes, becauſe the Writ commands only the Value to be enquired of. *Aliter* where Not Guilty is pleaded; for then the Treſpaſs is denied, and muſt be proved and tried by the Jury, and there in that Caſe both the Value and Property do come in queſtion. *Cro. Jac.* 220. *Goodwin* againſt *Welſh* and *Over*.

Where there be two Defendants, and the one pleads Not Guilty, and the other pleads another Plea, or juſtifies, *&c.* whereupon it is demurred, and Judgment is for the Plaintiff againſt the Demurrant, and a *Nolle proſequi* for the other. The Judgment as to the *Nolle proſequi* ought to be entred, *quod eat ſine die*. But where it is againſt one, Preſidents are both ways. *Cro. Jac.* 439. *Evely* and *Sloley*.

Treſpaſs againſt two. They imparle. At the day one appeared not, and thereon *Nihil dicit*. The other pleaded in Bar. The Plaintiff replied, and a Demurrer joined on the Replication, and adjudged *pro Quer.* And in the ſame Term a *Nolle proſequi* was entred againſt the firſt, and a Writ of Enquiry of Damages againſt the ſecond. *Per Cur.* This *Nolle proſequi*, or *Retraxit* againſt one, is as ſtrong as a Releaſe to one, which is a Diſcharge

of

of both. *Cro. Eliz. p.* 762. *Green* and *Charnock*. *Vide infra.*

Iſſue and Demurrer in Treſpaſs. *Ven. Fac* awarded as well to try as to enquire. Judgment on Demurrer for the Plaintiff. *Nolle proſequi* entred *quoad* the Iſſue; Writ of Enquiry awarded, and Judgment on this. 1 *Sanders* 340, 341. *Mellor* and *Spateman*.

In an Action where Damages are to be recovered, as in Treſpaſs, *&c.* if the Declaration be good in part, and inſufficient in part, and the Defendant demurs upon the entire Declaration, the Plaintiff ſhall have Judgment for that that is well ſaid, and barred for the reſidue. 2 *Sanders* 379, 380.

Judgment in *B. R.* that the Plaintiff ſhould recover Damages for part, and the Defendant *capiatur*, and that the Plaintiff *ſit in miſericordia pro reſiduo tranſgreſſionis*. It ſhould have been, *Quer. per cap. per Billam pro reſiduo tranſgreſſionis.* But it was held good. *Moor. Palmer* and *Sherwood's* Caſe.

In Treſpaſs of Battery againſt two, they plead ſeverally and found againſt both: there ought to be but one Judgment. *Vide ſupra*, *Cane* and *Somerſton*, *Tit. Damages.*

In Treſpaſs againſt Three, after Judgment it is aſſigned for Error, That one of the Defendants was an Infant at the time of the Plea pleaded by Attorney. *Per Cur.* It is Error: But being after Verdict, it had not been Error if one of the Plaintiffs, for whom it was, had been an Infant; that being ſaved *per Stat.* 21 *Jac.* and Judgment was finally reverſed. 1 *Keb.* 940. *Topham*, &c. againſt *Wilſon.*

If the Defendant be found Guilty of the Offence, he is to pay a Fine to the King.

Note, By the Statute of 16 and 17 *Car.* 2. 8. it is enacted, *That no Judgment after Verdict, Confeſſion by* Cognovit Actionem, *or by* Relicta Verificatione, *ſhall be reverſed for want of* Miſerecordia, *or* Capiatur, *or for that one is put for the other.*

Treſpaſs and 300 *l.* Damages recovered, and Judgment and Error brought of it in the Exchequer-Chamber, hanging which the Plaintiff brings Action of Debt in the ſame Court for the 300 *l.* *Et per omnes præter Keeling*, it well lies; for the Record it ſelf is ſtill in this Court, and the Writ of Error is a *Superſedeas* of the Execution only. 1 *Levinz.* 153. *Adams* verſus *Tomlins.*

Non informatus, and a Writ of Inquiry of Damages awarded. 1 *Browne* 375.

Non ſum informatus al novel Aſſignment, & breve d'enquiry awarded. Modus Intrandi 398.

Simile al Replication, and Inquiry awarded *ſans* aſſigning *locum in quo*, &c. Modus Intr. 398.

Simile in Treſpaſs and Aſſault. *Mod. Intr.* 399.

Simile in faux Impriſonment, and Inquiry awarded. *Mod. Intr.* 399.

Nil dicit al novel Aſſignment, ove Inquiry awarded. *Mod. Intr.* 399.

Simile al Replication ove Inquiry. Mod. Intr. 399.

Simile al Narration. ove Inquiry awarded. *Mod. Intr.* 400.

Simile in Aſſault and falſe Impriſonment. *Modus Intr.* 400. *Pl. gen. & ſp.* 619.

Judgment per default. 1 Browne 375.

2 *Demurrers & 1 Venire Fac. agarded en Aſſault, Judgment pro Def. ſans notice del Iſſue.* 1 Sanders 80.

Judgment pro Querente in Tranſ. cum exit. briat. ad barram. Tompſ. 455.

Judgment

Judgment in Tranſ. ubi Curia mitigat. dampna per Jurat. aſſeſſ. Tompſ. 457.

Judgment pro Quer. puis Verdict. Mod. Intr. 400.

Simile in Treſpaſs and Aſſault. *Mod. Intr.* 401.

Judgment ſur Breve d'Inquiry in Tranſ. Mod. Intr. 401.

Simile in Treſpaſs, Aſſault and Impriſonment continued *per non miſ. Breve.* Mod. Intr. 401.

Entre de Nolle proſequi verſus le Def. ſimul cum. Modus Intr. 400.

Proceſs Judicial.

Ca. Sa. in Treſpaſs and Aſſault. *Mod. Intr.* 402.

Ca. Sa. ſur Nonſuit. Mod. Intr. 402.

Ca. Sa. for ſeveral Damages in Treſpaſs and Aſſault. *Mod. Intr.* 402.

CAP. XXX.

What will be a good Diſcharge of Treſpaſs or not.

DEATH.

IF Treſpaſs be done to the Goods of the Teſtator in the Hands of the Executor, if the Executor after dies, his Executor ſhall not have an Action of Treſpaſs for this; for *actio moritur cum perſona. Vide prius*, 18 *H.* 6. 22. b. *contra.*

If one beat my Servant, and afterwards he dies, I ſhall have Treſpaſs; *aliter*, if my Wife. *Vide ſupra Huggin's* Caſe.

And if one raviſh my Wife, and my Wife dies, I may have an Action of Treſpaſs.

By Act of the Party, as Releaſe or Act in Law.

Releaſe to one Treſpaſſor diſchargeth all. *Vide Tit. Bar by Releaſe, Hobart p.* 66.

After Treſpaſs done on my Land, if I Alie the Land, I may have Treſpaſs for the Treſpa made before. 19 *H.* 6. 28. b.

If Bailee of Goods bring Treſpaſs, and the Baile brings other Treſpaſs, he which firſt Recove ſhall ouſt the other of the Action. *Vide Prius.*

Where a Man hath a perſonal Action agai two Defendants, if they plead ſeverally, and be Non-ſuit againſt the one before he hath Ju ment againſt the other, that he ſhall be bar againſt both, for it works in the nature of a R leaſe of the whole; but where there is but Defendant, and he pleads to one part in I

and to the other Demurrs, the Plaintiff may be Non ſuit for one point, and proceed for another. *Hob. p.* 180. *Slowley* and *Evely*.

Treſpaſs of Aſſault and Battery the laſt day of *Oct.* 10 *Jac.* The Defendants pleads, That he and one other in the ſaid laſt day of *Oct.* did joyntly enter into the Plaintiff's Houſe at *S.* and did then and there Aſſault the Plaintiff, and that afterwards, (*viz.*) ſuch a Day and Year the ſaid Plaintiff did by his writing Releaſe the ſaid *R.* of all Actions, *&c.* and avers it to be the ſame Treſpaſs, *&c.* and the Plaintiff traverſeth, without this that the Treſpaſs was joyntly done; and Demurrs on the Plea. A good Plea: Satisfaction by one is ſatisfaction for all, and the Plaintiff cannot have ſeveral Damages, but one Damage againſt them all. 1 *Brownl. Rep.* 196. *Cock* and *Jenman. Vide Meſme Caſe per noſme de Cock* and *Jennor*.

J. S. was ſeized in *C. B.* for a Battery ſuppoſed to be done in *London*; and the Plaintiff had Judgment and 30 *l.* Damages, and *J. S.* was taken in Execution for the ſame; and afterwards he and two others were ſued in *B. R.* for this Battery ſuppoſed to be done in *C. H.* And Judgment was againſt them, and it appeared that this Action and the Action in *C. B.* were for one and the ſame Battery; and that the Plaintiff had acknowledged ſatisfaction of the ſaid Judgment to *J. S.* in *C. B.* and yet againſt Law he had ſued to have Execution of the ſaid Judgment, *&c.* this was ſurmiſed in *Aud. qu.* by all the three. It was moved (on Demurrer) for the Defendant in the *Aud. quer.* That this cannot be ſurmiſed, becauſe the one Recovery being in *London*, and the other in *C. H.* it cannot be intended to be one and the ſame Battery. *Per Cur:* The Action being Tranſitory, it may be laid in what County

the Plaintiff will; and it being averred by the Record to be one and the ſame, and this being confeſſed by the Demurrer, the Plaintiffs are not ſuch Strangers to the Record, but they may have a benefit of the Satisfaction by the ſaid Record, and becauſe they are all parties to the Act, the Law gives them Liberty to take Advantage of any one of their Acts for the others Diſcharge, as in Caſe of a Releaſe. *Cro. Car.* 443. *Corbet* and *Barns.*

Treſpaſs brought againſt three, one Pleads *Non culp.* and upon the Iſſue and Verdict for the Defendant. And Judgment by default and Writ of Enquiry of Damages againſt the other two; and upon Judgment for the firſt Defendant, and Judgment for the Plaintiff againſt the other two, they only brought the Writ of Error, and Aſſign the want of an Original. And though there be a Verdict in the Caſe, it is not cured by the Stat. the Verdict being for the Defendant and ſo out of the Caſe. And ſo it is, as if the Action had been brought only againſt the; but if the Verdict had been for the Plaintiff againſt the firſt Defendant, this had been aided by the Statute; for the want of an Original *quoad* all is cured where any Verdict is for the Plaintiff. And tho' the Writ of Error be brought by two without the third, yet its good, for he may not be joyned, for he being acquitted, and Judgment for him, he cannot ſay the Judgment is to his Damage. 1 *Levin.* 210. *Cannon* and *Abbot.*

FINIS.

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